# Jurisprudence and legal theory

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# Jurisprudence and legal theory

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# Contents

# Chapter 1 Introduction

## Contents



## Introduction

This subject guide has been written to show you how to lay a solid foundation of knowledge and critical understanding in Jurisprudence and Legal Theory. This will help prepare you, ultimately, for the examination. The guide is not intended as a primary source, or a textbook, and it would be a mistake to treat it this way.

The best way to study is to commit yourself to a **sustained reading and writing programme** from the beginning of the first term. It is typical for an internal student at the University of London to spend two hours in seminars each week for Jurisprudence throughout the academic year and, in addition, the equivalent of further full day's work in the library, reading and taking notes. In the two months before the examination, he or she would normally begin to formulate coherent thoughts in the subject by practising trial paragraphs, series of paragraphs, and finally essays. The activities and sample examination questions in this guide are designed to help you develop these skills.

If you follow this pattern and, better, if you are able to let someone else read what you write and discuss it with you, you will place yourself in the best possible position for achieving an excellent mark in the examination. Jurisprudence can be enjoyable. The questions it deals with are very important and they constantly impinge upon the consciousness of all lawyers. You really can go a long way with this subject by a relaxed reading of a variety of jurisprudential writing.

**Learning outcomes for this Introduction**

By the end of this Introduction, and the relevant reading, you should be able to:

- state the intended learning outcomes of the module
- decide which books to buy and obtain them
- locate and distinguish the primary and secondary sources
- devise an appropriate structure for an examination question in Jurisprudence.

**Essential reading for this chapter**[1]

- Freeman, M. (ed.) *Lloyd's Introduction to Jurisprudence*. (London: Sweet & Maxwell, 2001) seventh edition [ISBN 0421690208].
- Dworkin, R. *Law's Empire.* (Oxford: Hart Publishing, 1998). [ISBN 1841130419] Chapter 1.
- MacCormick, N. and W. Twining 'Legal Theory and Common Law' in B. Simpson (ed.) *Legal Theory and Legal History: Essays on the Common Law.* (London: Hambledon Press, 1987) [ISBN 0907628834] Chapter 13.
- Hart, H. *Essays in Jurisprudence and Philosophy.* (Oxford: Clarendon Press, 1983) [ISBN 0198253877] Chapter 1: 'Definition and theory in jurisprudence' (also in 70 *Law Quarterly Review* 37).
- Fuller, L. 'The Speluncean Explorers' in Freeman, pp. 51–63 (also in 62 *Harvard Law Review* 616) (see above).

[1] Read these before you go on to Chapter 2.

## 1.1 How to study jurisprudence

An initial problem in studying jurisprudence is the orientation of the subject.

Come to it with an open mind and do not bother if at first it is not obvious why you should be studying it or what use it will be to in your future career. The answers to these questions will become clear to you during the year. If you study properly, you will gain a broad and flexible approach to legal questions of all sorts. Jurisprudence allows you to step back from the minutiae of what you're doing in the core subjects and speculate on more general, but equally pressing, questions of law. In popular language, you will learn how to think **laterally**.

Teachers of jurisprudence well understand that for first-comers to the subject, the initial orientation can be hard going. They are also used to the enthusiasm that frequently develops later, and which remains for a very long time. We frequently meet former students, some now distinguished practising lawyers, who at alumni functions tell us that they would 'like to have spent more time studying jurisprudence'. Our experience, too, is that this seemingly unpractical subject is not unpopular with practising lawyers. Don't be the unsuspecting interviewee who says 'I hated jurisprudence because it meant less time on commercial law, taxation, etc.' because that can strike just the wrong note with a future employer. Flexibility and breadth in thinking and writing are both sought-after criteria of employability.

You should note early on that facts are much less important in jurisprudence. It is the **ideas** that are important. True, the subject has facts, and case-law type subjects are not devoid of ideas. Nevertheless, there is a far greater proportion of abstract, theoretical material in jurisprudence, and the single most common problem is failure to appreciate this. Read Fuller's 'The Case of the Speluncean Explorers' for an enjoyable way to see how a relatively simple set of facts lends itself to vastly different approaches, each characterised by certain abstract ideas. That article, by the way, is used as the introductory reading in jurisprudence in law schools all over the world.

## 1.2 Reading

### Essential reading[2]

[2] Subsequently, we will refer to the essential reading texts simply by the author's name: 'Freeman', 'Hart' etc.

- Freeman, M. (ed.) *Lloyd's Introduction to Jurisprudence.* (London: Sweet & Maxwell, 2001) seventh edition [ISBN 0421690208].
- Penner, J. et al. (eds) *Jurisprudence and Legal Theory: Commentary and Materials.* (London: Butterworths LexisNexis, 2002) [ISBN 0406946787].
- Hart, H. *The Concept of Law.* (Oxford: Oxford University Press, 1994) second edition [ISBN 0198761228].
  **THIS IS THE SET BOOK AND IT IS VITAL THAT YOU BUY IT.**

### Recommended texts

The following are books that could be usefully bought, but if they are readily available from a library, that is fine:

- Dworkin, R. *Law's Empire.* (London: Fontana Paperbacks, 1986) [ISBN 0006860281].
- Hart, H. *Essays in Jurisprudence and Philosophy.* (Oxford: Oxford University Press, 1983) [ISBN 0198253877].
- Morrison, W. *Jurisprudence: From the Greeks to Post-modernism.* (London: Cavendish, 1997) [ISBN 1859411347].
- Simmonds, N. *Central Issues in Jurisprudence: Justice, Law and Rights.* (London: Sweet & Maxwell, 2002) [ISBN 0421741201].

### Useful further reading

Other works that you will find useful throughout the module are:

- Berlin, I. 'Two concepts of liberty' in *Four Essays on Liberty.* (Oxford: Oxford University Press, 1979) [ISBN 0192810340].
- Cotterrell, R. *The Politics of Jurisprudence.* (London: Butterworths Law, 2003) second edition [ISBN 0406930554] Chapter on Bentham and Austin.
- Devlin, P. *The Enforcement of Morals.* (Oxford: Oxford University Press, 1965) [ISBN 0192850180].
- Dworkin, R. *Law's Empire.* Chapters 1, 2 (particularly pp. 76–86), 3, 5 (particularly pp. 164–75), 6, 7, 8 and 10.
- Dworkin, R. *Taking Rights Seriously.* (London: Duckworth, 1977) [ISBN 0715611747] Chapters 4 and 5.
- Fuller, L. 'Positivism and fidelity to law – a reply to Professor Hart' (1958) *Harvard L.R.* 690 (extracts in Freeman, pp. 370–373).
- Guest, S. *Ronald Dworkin.* (Edinburgh: Edinburgh University Press, 1997) second edition [ISBN 0748608052] Chapters 2, 3, 4, 7 and 8.
- Guest, S. (1988) *Law Quarterly Review* 155 (Review of *Law's Empire*).
- Hart, H. *Essays in Jurisprudence and Philosophy.* Essay 1 (particularly pp. 21–35), Essay 2, Essay 3 and Essay 16.
- Hart, H. *Law, Liberty and Morality.* (Oxford: Oxford University Press, 1962) [ISBN 0192850172].
- Hohfeld, W. Extracts in Freeman, pp. 510–514.
- Rawls, J. *A Theory of Justice.* (Oxford: Oxford University Press, 1972) [ISBN 0198243685] pp. 22–27, and pp. 46–53.
- Raz, J. 'The purity of the pure theory' (1981) in Freeman, pp. 327–37.

- Simmonds, N. *Central Issues in Jurisprudence.* Chapters 1, 3, 5; pp. 58–62 (including suggested reading); and Chapters 8 and 9, particularly pp. 135–52, including reading.
- Waldron, J. *Law.* (London: Routledge, 1990) [ISBN 0415014271] Chapter 5.
- Williams, B. 'The idea of equality' in P. Laslett and W. Runciman (eds) *Philosophy, Politics and Society.* (Oxford: Blackwell, 1962) [ISBN 0631048804] p.125.

### 1.2.1 How to read works in jurisprudence

Appreciate that the subject-matter is difficult. You will have to learn to read difficult to understand works. This means that you should slow down and contemplate everything carefully. It is not like reading a light novel! And for that matter, as you know, reading the reports of judicial decisions can be difficult. Each chapter of the set book, Hart's *The Concept of Law*, requires several hours, sustained effort.

Every so often, ask yourself what you've just read. Put your book down and write down, or speak aloud, what the writer has said. You will find that, if you can do it, you will remember having done it!

The great jurists were straightforward people who spoke naturally and not in jargon. What they have in common is:

- sound moral perception
- the intellectual ability to range from the very abstract to the very practical.

The **primary** sources, it should go without saying, are the best. You must read some of Austin, Kelsen, Dworkin, Fuller and so on. Only in that way will what these people say become real to you. It is relatively easy for an examiner to spot whether you have or have gleaned your knowledge of jurisprudence from a primary source. They remain the most important and fruitful of the texts that you should read. As far as secondary texts are concerned, Freeman and Penner have already been mentioned. An excellent overview intellectually is Simmonds' *Central Issues in Jurisprudence.*

Many find Dworkin very difficult to read, mainly because he is a more abstract thinker than most. But he is worth the effort. His most accessible work is his article 'The Model of Rules' (it sometimes appears as 'Is Law a System of Rules?') now incorporated as Chapter 2 of *Taking Rights Seriously*. Chapter 1 of *Law's Empire* is also very readable. There is a secondary source for Dworkin in Guest's *Ronald Dworkin* (1997).

### 1.2.2 Learning outcomes for the module as a whole

Besides getting to know the syllabus, which is printed in the Regulations, you should regard the following learning outcomes as what the subject will produce if conscientiously and seriously followed. The assessment in the final examination will be based on your performance.

By the time of the examination you should be able to:

- expound and criticise important ideas of selected jurists in the Anglo-American traditions

- demonstrate an ability to think in a more abstract or general fashion than is generally achieved in the study of specific areas of law
- demonstrate a willingness to question and think independently and to find out more
- demonstrate systematic reading
- demonstrate a thorough reading of Hart's *The Concept of Law,* showing a sympathetic yet critical appreciation of the major arguments of that book.

These outcomes are related. Reinforcement of what the examiners are looking for will be found by studying past examination papers in which you will spot the familiar forms of questions and format. How well you read around the subject is crucial to how well you do in the examination. The examiners do not want to read parroted pieces of information. Such answers will fail. Topic spotting will not do either. The present syllabus is short enough for all topics to be covered and for all of them to be approached in an intelligent and systematic way.

## 1.3 Preparing for an examination in jurisprudence

### 1.3.1 Content and orientation of your answer

Sample or model answers can be a disastrous way of teaching jurisprudence since they suggest that there is only one right way of answering a question. In fact if each reader displayed real imagination and ingenuity – based on some knowledge, of course – **all the answers would receive firsts, and no two answers would be the same**. But there are some pointers that can be given in the following example. This question appeared in the 2004 Home paper:

'Does utilitarianism provide solutions that we could adopt when we are considering what, morally, to do?'

**Content**

Here is an example of the **content** that should be in the answer:

- A clear and reasonably detailed account has to be given of utilitarianism. You should see the subject guide Chapters 3 and 13 and you should return to what I am saying here again when you have mastered the reading in those two chapters. This account would have to be fair to utilitarianism as well as being fair to its critics. If, for example, you were a utilitarian, it will help your case to make the version of utilitarianism you accept as strong as possible and it will also help that you can handle the strongest criticisms that can be made of it. If you are a utilitarian, then probably the strongest form will be some form of rule utilitarianism, because that can most easily explain the status of moral and legal **rights**.

**Orientation**

What is also required is **an orientation of your own**.

This means stating clearly whether you agree or not, **giving reasons**. Giving reasons is important because it is typical for

candidates to say in an examination that they either agree or disagree with some proposition without saying why. In a courtroom, as a future lawyer, would you think it was acceptable, to your client, to the judge, simply to say 'I disagree' with the argument on the other side? Of course not! So, you might say something like the following in this part of your answer:

- **Critics of utilitarianism emphasise**[3] the strength of our moral intuition that people have rights – the right, for example, not to be killed. They say that the existence of these rights defeats a utilitarian calculation that the greater good would be served by killing, as, for example, in cases where to remove feeding tubes from irreversibly comatose patients would conserve hospital beds and save money, or where to kill a drunk tramp (secretly, painlessly and unbeknown to him) would contribute to cutting petty crime. This argument is powerful because it focuses on the ultimate reason for preferring utilitarianism, namely, that it is people who are the recipients of acts directed at the public good and so suggests that utilitarianism is fundamentally confused.
- But **there are two answers** to this powerful objection. The **first** is that, because the rationality of the utilitarian doctrine lies in the fact that it describes practically all of our intuitions, it can lead us to **better conclusions than our intuitions can** in troublesome cases. The **second** is that we can say that 'there is a rule that' we must not kill, under which irreversibly comatose people and tramps have 'rights to life', and observance of that rule in all cases in the long run leads to the greater good.
- These two solutions point in different directions. **In my view, the second is to be preferred** because that is more reconcilable with our intuitions than the first. It is difficult to be told, as Smart tells us, that on occasions we must not be 'morally squeamish' about doing what utilitarianism requires for, after all, morality requires that we 'care', and must do so in every case. But rule utilitarianism reminds us that people have rights – and so that intuition is satisfied and in terms of a theory which ultimately relies on our aiming for the morally good consequences for society.

[3] We have emphasised the crucial moves in the argument in **bold type**.

### 1.3.2 Structure of your answer

The following remarks concern the **structure** that should be in the answer.

- An opening paragraph, or set of paragraphs, which should have **impact**. This sets out what you are going to do clearly and succinctly and gets straight into it.
- As in the above argument on utilitarianism, the centre section should contain **argument** backing up your views. (You can share views with others, giving reasons; but merely parroting others is out.) The point is that these ideas must be **yours** and you must **back them up**.
- A summing up in which you draw your **conclusion**. This should not be a repetition but a neat summary of your view. This summary shows that your answer forms an argument in which you have set out to do something and that you have

done it. You must tell the examiner that you are, or are not, a utilitarian!

Finally, the following is designed to get you to see what would be very desirable in answering the question.

- A jurisprudence answer must show knowledge, independent thought and the ability to argue. In addition, it must show an ability to cross-reference to other ideas and writers. This last is essentially the ability to think abstractly. Note the reference to rule utilitarianism and to Smart in the above two paragraphs about utilitarianism.
- Use examples. It is always helpful to show your awareness that jurisprudential questions must be tested against real life. Note the reference to the 'irreversibly comatose patient' and to the 'drunk tramp' in the above.

**Reminder of learning outcomes**

By this stage you should be able to:

- state the intended learning outcomes of the module
- decide which books to buy and obtain them
- locate and distinguish the primary and secondary sources
- devise an appropriate structure for an examination question in Jurisprudence.

*Good luck!*

*Stephen Guest, Adam Gearey, James Penner and Wayne Morrison.*

*July 2004*

**Notes**

# Chapter 2 The nature of jurisprudence

## Contents



## Introduction

This chapter introduces you to the subject-matter of jurisprudence, and in particular to the different methods that jurists have used to produce their theories of law. The broad distinction very commonly used between two types of theory is that they are either **descriptive** of the subject-matter of law, in all its forms, or that they are **normative** or **prescriptive** about what the subject-matter of law **ought** to be. These two ideas – the descriptive and the normative – are very common in jurisprudential thought. In recent years in Anglo-American jurisprudence, they have been joined, largely through the work of Ronald Dworkin, by a third type of theory, an **interpretive** theory. All these ideas need to be explained.

### Learning outcomes

By the end of this chapter and the relevant reading, you should be able to:

- distinguish, giving examples, between 'descriptive', 'normative' and 'interpretive' theorising
- indicate what some major problems of jurisprudence are
- discuss critically the point of defining law
- explain your own view of the relationship between theory and practice.

### Essential reading

- Dworkin, R. *Law's Empire*. Chapters1 and 2.
- Freeman, M. (ed.) *Introduction to Jurisprudence*. Chapters 1 and 2.
- Hart, H. *The Concept of Law*. Preface and Chapters 1 and 2.
- Hart, H. *Essays in Jurisprudence and Philosophy* Essay 1, particularly pp. 21–35 (this essay is Hart's famous inaugural lecture at the University of Oxford, which he delivered in 1952), and Essay 3.

- Penner, J. (ed.) *Jurisprudence and Legal Theory.* Chapter 1.
- **Case:** *Madzimbamuto* v *Lardner-Burke* (see [l966] RLR 756; SA l968 (2) 284; and [l965] A.C. 645.

## 2.1 What is jurisprudence?

Jurisprudence consists of the study of the nature of law and its related ideas.

Many of the difficult problems are purely **philosophical**. The following are such problems, and you will be expected to develop **your own** views in relation to them. What is definition? What is a rule? What is law? What is morality? What is justice? What is a critical standpoint?

But there are also interesting questions of **political morality** which impinge on your life. Examples are: Should the law enforce conventional morality? What is the relationship between freedom and equality? How should difficult legal cases be decided? Can equality take into account differences between sexes? Should judges be concerned with economic questions? What follows from a person's 'having a right' to something? What is the justification, if any, for punishing people? Should 'hate speech' be a criminal offence? Jurisprudence will help you formulate your convictions on these vital questions.

There are, finally, interesting questions of **sociology and history**. The following are such questions. What generally shaped the law in Western societies? What were the main claims of the feminists? What major trends influenced law schools in the United States in the twentieth century? What are the effects of law? What events can be shaped by the adoption of laws? Is law of any sort naturally repressive – or liberating?

Jurisprudence is full of outstanding thinkers. Austin and Bentham – both of whom, in their own ways could be claimed to be the founders of legal education at the University of London, thought law was about power. Hart and Kelsen thought it was imbued with authority – although not **moral** authority as did Fuller of the Harvard Law School and as does Dworkin. Austin thought judges were deputy legislators. Dworkin thinks that judges only create law that is largely coherent with existing legal practice. Marxists think that law only serves the interests of the powerful and the rich. The 'critical legal scholars' think law schools provide a veneer of respectability over chaos and conflict. Some jurists believe that courts enforce moral rights; others, such as Bentham, think that this idea is 'nonsense upon stilts'.

Or take Kelsen, the distinguished constitutional lawyer, international lawyer and jurist. One only has to observe many of the great constitutional cases fought in the highest courts in countries of present or former Commonwealth jurisdiction over the past 30 years to see the impact that Kelsen had. Indeed, the 1,000 pages of the 1965 decision of the Rhodesian General Division court of *Madzimbamuto* v *Lardner-Burke* (see [l966] RLR 756; SA l968 (2) 284; and [l965] AC 645) portray a formidable line-up of jurists whose ideas were marshalled both for and against the Rhodesian government's case. The example of the Nazi legal system, too, with

its barbaric laws, has also raised real, live problems. Did Nazi bureaucrats really have a legal defence of any sort at all when they declared that they were just obeying orders? This was an acute problem at the famous Nuremberg war crimes trials which took place after the Second World War had ended. It continues to be a live issue.

## 2.2 Methodology, analysis, theory and the idea of definition

**Essential reading**

- Dworkin, R. *Law's Empire*. You should read the whole of this as soon as possible; to start with it would be useful to follow up some of the references to 'interpretation' in the index.
- Finnis, J. *Natural Law and Natural Rights.* (Oxford: Oxford University Press, 1980) [ISBN 0198761104] Chapter 1.
- Hart, H. *Essays in Jurisprudence and Philosophy.* Intro, pp. 1–6, especially pp. 5–6; and Essay 1 *The Concept of Law.* (second edition) Chapter 9.
- Raz, J. *Ethics in the Public Domain.* (Oxford: Oxford University Press, 1994) [ISBN 0198258372] Chapter 8: 'A problem about the nature of law'.

It is vital early on to get a 'feel' for what the different jurists you study are trying to do. It is important to distinguish a 'descriptive' theory – loosely, one that describes things 'as they are', as a geographer might describe a continent, or a riverbed – from a 'normative' theory. This latter causes some difficulty at first, because of the unfamiliarity of the term. But it means a theory which says how people **ought to** or **may** behave (or **must**, or **should**, etc. … you'll get the idea). You should therefore be able to see why normativity and rule following are two closely related ideas. Laws are normative because they tell people how they ought to, or may, behave. And a moral theory like utilitarianism is a normative theory because it says that people **ought** to act in the interest of the general happiness.

There are two important things to note. Examination candidates often misunderstand them:

- A theory can be descriptive and normative at the same time. This would be the case where a theorist said 'this is what law is like' **and** 'this is how we **ought** to regard law'. Some people have argued that the best way to read Hart is like this.
- The subject matter of a descriptive theory can be normative. A descriptive theory of law will often be like this, since the subject matter is at first sight normative. For example, we might **describe** part of the law of England by saying 'The law **is** (description) that people **ought not** (normativity) to obtain property by deception, according to s.15 of the Theft Act 1968.'

Hart, Dworkin, Raz and Finnis are very sensitive to these differences, but many other theorists are not.

**Activity 2.1**

Give five or six examples of descriptive and normative statements from science, art, literature, music, morals, law and politics. Contrast them, pointing out the significant differences.

Start by indicating which of the following statements are descriptive and which normative: 'Picasso's painting *Guernica* is 20 feet by 10 feet and is mostly black marks on white' ; '*Guernica* is one of the great works of art of the twentieth century'. Further example: 'You have a lot to learn'; 'You ought to get started'.

Are any of your examples also theoretical statements? What is a theoretical statement?

Feedback: see page 21.

## 2.3 Theory and evaluation

Subtle awareness of the role of evaluation in theorising is displayed by Finnis in Chapter 1: 'Evaluation and the description of law' of his *Natural Law and Natural Rights*. It is difficult to read but it is well worth it. What is interesting is his affirmation of the theoretical approach devised by Weber (see Chapter 12 of this subject guide):

> '… that the evaluations of the theorist himself are an indispensable and decisive component in the selection or formation of any concepts for use in description of such aspects of human affairs as law or legal order.'

Try to see what this means by considering the following comparison between two evaluative theories of what **baldness** is. If we can see differences here, it would seem that the case is clearly established for seeing differences in something like law.

The trichologist, whose job it is to sell hairpieces and baldness cures, is only interested, *qua* baldness, in the **inability** to grow hair. His skinhead son, not interested in earning a living, thinks baldness is a style thing, one for which the **ability** to grow hair is necessary as it shows youth, vitality and sexual power. Dad and son might ask each other to revise their central conceptions of baldness ('it's where the money is, son'; 'style's more important than money, Dad'). It seems right to say, along with Finnis, that these differences in outlook cannot be resolved by reference to language.

**Activity 2.2**

Consider the trichologist and his skinhead son. This analogy seems powerful. How powerful is it really?

- Is there really a 'common' concept of baldness that both of them share?
- Does it make sense to say that they differ in their 'conceptions' of this concept?
- Would it matter if neither of them had never used the word 'concept' in their lives before?
- What is a 'concept'?

Feedback: see page 21.

The approach to theorising I've just outlined is much more prevalent now, although there is a school of jurists who think that proper philosophical analysis proceeds by way of descriptive accounts of the 'concepts' that we already have. For example, Hart maintains that view in the Postscript to *The Concept of Law*, saying that there is a difference between the characterisation of a concept and what he calls 'its application' (although he is a little obscure here). Other jurists, with Raz, take the view that law is a concept that can be characterised in a way that it is independent of adopting any evaluative point of view in Finnis's sense. These jurists can therefore conclude that Dworkin is wrong to identify questions to do with the justification – Hart's 'application' – of particular legal decision with law as a whole. That is, legal theorists according to Raz should characterise and describe the concept of law independently of trying to say that it should serve a special purpose.

### Hart's methodology

For a real insight into what Hart thought methodology in jurisprudence was about, however, you should read Chapter 9 of *The Concept of Law* very carefully, making notes whenever you think Hart is making a methodological point. You will note that he spends much time debating the merits of choosing a 'wide conception of law' over a 'narrow conception of law', this latter being the natural law conception. You might have noted in passing that he has moved from talk about 'the concept' of law, to two rival conceptions. And then he makes the give-away remark, on p. 209, that 'Plainly we cannot grapple adequately with this issue if we see it as one concerning the proprieties of linguistic usage'.

Seen against the background of his whole approach in the first part of the book, where he refers to 'linguistic usage', for example, to distinguish the gunman situation from the legitimate taxman situation (the gunman merely 'obliges'; the taxman 'imposes an obligation') this is a striking thing to say. Finally, Hart, in one of the most important paragraphs of his work, says that the main reason for identifying law independently of morality – in other words, his justification for legal positivism – is to preserve individual conscience from the demands of the state:

> 'What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny.' (p. 210)

You should note, too, Hart's retrospective admission in the Preface to his *Essays in Jurisprudence and Philosophy*, at pp. 5–6, that it is a mistake to think that all questions can be solved with reference to the way we **actually** speak.

## Summary

It seems possible that theories are produced with a motivation to further a practical interest. Finnis and Dworkin are clearly of this view, and it seems implicit at least by halfway through *The Concept of Law* and explicit in Chapter 9 of that book.

## 2.4 The 'interpretive' approach

**Essential reading**

Dworkin, R. *Law's Empire*. Chapter 2 (Chapters 3 and 9 are also very useful).

Dworkin, R. *Taking Rights Seriously.* Chapter13 and pp.134–36 (useful on the distinction between concepts and conceptions).

Guest, S. *Ronald Dworkin.* Chapter 2.

One way of taking up these questions about the role of evaluation in the discussion of concepts is to draw a distinction between 'concepts' and 'conceptions'. Concepts, we might say, are relatively loose and uncontroversially accepted sets of ideas, perhaps the sorts of thing dictionary definitions are, overall, concerned with. So a dictionary will tell us that 'law' is to be distinguished from 'bicycle' because people just uncontroversially accept that 'law' has to do with rules, sanctions, courts, and so on, and 'bicycle' has to do with pedalled vehicles, two wheels and so on. It only gets interesting when some theorist proposes a way of looking at the 'concept'. Then we might say that he proposes a conception of it. So Fuller's 'conception' of law differs from, say, Weber's 'conception', because Fuller thought law could only be characterised in a moral way, whereas Weber thought it could only be characterised, as Hart does in the earlier part of *The Concept of Law*, as value-free.

It was through a distinction between concepts and conceptions, and dissatisfaction with the rigidity of the distinction between 'descriptive' and 'normative' accounts of law, that Dworkin introduced into his theory the methodology of the 'interpretive concept'.[1] Dworkin says that the essential idea in interpretation is 'making the best of something that it can be', and this very abstract idea is to be applied to the idea of law. A number of ways can be used to describe the idea of making the best of something. The quickest way to the idea is through the notion of a thing having point, for example. Ask yourself what the **point** of the thing you are interpreting is, the way you might ask yourself 'what is the point of the prohibition of vehicles in the park' in the course of producing a legal argument about roller skates. But another metaphor is that of placing a thing in its 'best light', whereby we assume that the thing has some point and we examine it as thoroughly as we can to see what is the most sensible way of viewing it.

[1] Note that Dworkin opts for the spelling 'interpretive' rather than the more classically correct 'interpretative'.

### Summing up

All these questions are deep questions of methodology in general, but you should think about them particularly in formulating your approach to jurisprudence. You should be aware of them since they will help you to steer your way through the various theories and adopt an attitude. If you can lift yourself in thinking about jurisprudence from merely saying 'what other people said' to '**what I think**', you have oriented yourself correctly. You should not be deterred by the eminence of these theorists, or by the apparent abstraction of these ideas. You should be able to say something of interest and sense to an examiner and thinking about these things

will help your own approach to legal argument as a lawyer because it will make you think about the methodology you are employing **yourself** in constructing legal arguments.

### Reminder of learning outcomes

By this stage you should be able to:

- distinguish, giving examples, between 'descriptive', 'normative' and 'interpretive' theorising
- indicate what some major problems of jurisprudence are
- discuss critically the point of defining law
- explain your own view of the relationship between theory and practice.

### Sample examination questions

The following questions are about methodology. In each of them, the good candidate will provide some answer to the question of what the theorist is trying to do.

**Question 1** What lessons can we learn from Hart's discussion of the Nazi grudge informer case?

**Question 2** 'Discuss the role of the "rule of recognition" in Hart's theory of law. Does it achieve what he hopes?'

**Question 3**. How did Hart define legal positivism and what were his arguments for it?

### *Advice on answering the questions*

**Question 1** You should read Chapter 7 of the subject guide before trying to answer this. But the question requires you to think about why that particular case, discussed by Hart in some depth in Chapter 2 of *Essays in Jurisprudence and Philosophy*, and again in Chapter 9 of *The Concept of Law*, should have been decided as Hart says. Given that the better decision, in Hart's view, would have been the one that was inspired by an acceptance of his own theory of law, a good candidate would consider whether Hart was judging his theory of law according to whether it would produce better judicial decision-making. If this is what Hart was doing, then it suggests he thought that moral judgment is what you judge legal theories by.

**Question 2** Besides describing and discussing what the rule of recognition is, you should show the examiner:

- that you 'cure the defect' of uncertainty in a pre-legal world of primary rules alone; to achieve a distinction between empirical factual statements about the concordant practice of 'officials' of the system and morally evaluative statements, etc.) **and**
- that there might be a difficulty in reconciling **description** of law with endorsing a desirable **function** of law **and**
- that you have a view about this.

You will be interested to know that only a few candidates will discuss these final two points. Good marks in jurisprudence start here, and it is where jurisprudence starts to become interesting.

**Question 3** This would require special attention to:

- Hart's method of linguistic analysis
- his construction of the secondary rules in response to the 'social defects' of a regime of primary rules alone, since this looks 'practical' rather than 'descriptive'
- his arguments for the 'wider' conception of law over the 'narrower' conception of law in Chapter 9.

### *Feedback to activities: Chapter 2*

**Activity 2.1** Here as elsewhere in jurisprudence, there is always room for disagreement. In the example of Picasso's *Guernica* the statement that the painting is a certain size is clearly descriptive. It is also reasonable clear that '*Guernica* is one of the great works of art …' is not descriptive because there are many people (such as those who think that abstract art is not really art) who do not think that *Guernica* is great at all. What sort of statement is it? Does it say what people **ought to do** and so is normative? In one sense it does. When you say something is good, you are commending it to other people and encouraging them to think in the same way. A more usual expression would be to say that the statement about *Guernica* is an **evaluative** statement. But if you adopted a theory that said 'all great art is that which is accepted as great art by a majority of people' (not a very good theory in my view) and if you then said '*Guernica* is great art', then it is certainly possible to argue that what you say is just description: it just describes the fact that a majority of people have accepted *Guernica* to be a great work of art. How does this relate to law? Lord Diplock was famous for taking what is known as the 'literal' approach to statutory interpretation. When he said that 'the words plainly meant' he took himself to be simply describing the law (that other judges did not find the meaning of the words so plain did not appear to bother him). But, it seems reasonable to say, he adopted a theoretical account of what he as a judge was supposed to do: when the plain meaning of a statute pointed in one direction, even if the result would have been odd, he assumed he had a duty to apply the statute so understood. At times, Lord Diplock would talk of the importance of applying Parliamentary sovereignty (he expressed it from time to time in the form of a warning to judges not to 'usurp the Parliamentary function'). And so we have a theoretical and also a normative statement about the relationship between the judiciary and the legislature ('judges must not usurp the Parliamentary function') and a descriptive statement ('this is what the plain meaning of the statute is'). Chapter 1 of *Law's Empire* is helpful in showing these differences in its discussion of three cases.

**Activity 2.2** I think that the analogy works very well to show that our views about things are shaped by our practical interests. There is a 'thing' there, a 'state of baldness' which is neutral between the different attitudes towards it, but it only gets interesting when the father and son disagree about that thing. Isn't it reasonable to assume that arguments about law are like this?

**Notes**

# Chapter 3 Imperative or command theories of law

## Contents



## Introduction

This chapter considers what can be regarded as the earliest modern legal theory in England – the imperative or 'command' theory of law, associated with Jeremy Bentham and John Austin. The theory is based in a conception of sovereignty derived from long traditions of political thought to which Thomas Hobbes was a chief contributor, but adapted in significant ways to what Bentham and Austin understood as the political, social and legal conditions of their times. The chapter will first consider the influence of Thomas Hobbes but most attention will be devoted to Austin since his influence on the general course of development of legal theory in the UK has been much greater than that of Bentham, while Hobbes has been strangely neglected.

In reading the material, you are asked to note how Austin's ideas differ from Hobbes' or Bentham's and also to note what each of these writers was reacting **against**. There are also a number of general questions to consider:

- What was it in earlier legal thought that they were so anxious to discard and deny?
- What was the role of utilitarian considerations in their theories?
- Hobbes is considered the father of English political liberalism, while Bentham is usually considered a liberal thinker. How far is this the case with Austin too? Can Austin be considered to offer in some sense an anti-liberal legal theory?
- What is Austin's view of the nature of legal and political authority?
- Why did Austin (as Hobbes before him) consider that international law was not really law but a form of positive morality? Why did he consider constitutional law in a similar way?

- Are there fundamental problems both with the idea of law as a command and with the Austinian theory of sovereignty?
- How apt are Hart's criticisms of the theory he claims to have discerned from Austin?

In addition, you should reflect on the process of reading and understanding a writer's words, particularly those from an earlier historical period. Should we construct a model based on their writings which we take to have trans-historical meaning, or should we seek to understand their theories in the social, economic and political conditions of their times?

### Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- adopt an effective approach to reading original extracts from key writers
- critically discuss the emergence of legal positivism and the core meaning of legal positivism
- discuss the advantages and disadvantages of a theory of law based on the idea of the commands of the sovereign
- analyse the social and political context in which Austin wrote and how Hart has interpreted his project.

### Essential reading

- Penner, et al. Chapter 3: 'Debating with natural law: the emergence of legal positivism'.
- Cotterrell, R. *The Politics of Jurisprudence: a critical introduction to legal philosophy*. (London: Butterworths Law, 2003) second edition [ISBN 0406930554] Chapter 3: 'Sovereign and subject: Austin and Bentham'.
- Morrison, Chapter 9: 'John Austin and the misunderstood birth of Legal Positivism'.

### Useful further reading

- Freeman, Chapter 4: 'Bentham, Austin and classical positivism'.
- Harris, J. W. *Legal Philosophies*. (London: Butterworths Law, 1997) [ISBN 0406507163] Chapter 3: 'The command theory of law'.
- Davies, H. and D. Holdcroft *Jurisprudence: Text and Commentary.* (London: Butterworths Law, 1991) [ISBN 0406504288] Chapter 2: 'John Austin'.
- Lloyd, D. (Lord Lloyd of Hampstead) *The Idea of Law.* (London: Penguin Books, 1991) [ISBN 0140138307] pp. 170–90.

## 3.1 The birth and development of secular or 'positive' theories of law: the case of Thomas Hobbes

### 3.1.1 Introduction

The work of Thomas Hobbes[1] (1588–1679) constitutes the founding moment for the stream of political philosophy and political orientation we call liberalism. His work provides a transition from the medieval intellectual synthesis wherein God was seen as the creator of life and God's presence was seen in the organisation and life flows of the earth to a more secular foundation for government. In many respects Hobbes is the real father of legal positivism, except that he was several hundred years ahead of his time.

In his famous *Leviathan* (published in 1651, just after the English Civil War) Hobbes sought to convince his audience – the country's ruling elite – of a new structure of legitimation for government. Or, to put it another way, he came up with a new way of describing the nature of government and justifying the need to obey it. This theory of legitimacy, or argument for why we (the 'subjects') should give it our obedience, was founded on a narrative or story of mankind's nature – our position in the world – that gave us an understanding of our basic problems of existence. We were meant to see ourselves as actors in this narrative and be led to agree that we would as rational creatures (calculating individuals) accept the need for a strong government. His legitimating idea for modernity was a social contract.

In the midst of a social order facing the chaos of the English Civil War, Hobbes presented a new social ethic, that of individual self-assertion. The world was to become a site for individuals to follow their desires, to plan their personal and social projects, and to realise their power. Whatever the final power in the cosmos, it was certain, Hobbes stated, that as we are in charge of civil society, we could fashion a political instrument to allow us to pursue our ends, our interests. Expansion and progress were possible; but only if we could first create the framework of a stable social order: the first and greatest enemy was social chaos. We overcame this through calculation, the rational calculation of individual humans based on their experience and understanding of the human condition.

When we read we are subjected to the rhetorical ploys of the writer. Hobbes is still seen as very important, in part because over the centuries since he wrote many people have considered that he captures certain key aspects of the human condition. In approaching his work, as with that of all the other writers covered in this module, we need to become aware of his foundational assumptions, the way he presents the facts, the often subtle way he leads the audience into his way of appreciating things, and then how they make their conclusions seem to flow logically and naturally from what proceeds.

Hobbes gives a narrative of the 'natural condition of mankind', which, some think, he presented in such a way that almost any government would seem better than the 'solitary, poor, nasty, brutal and short' life he gave pre-social-contract man. In this respect Hobbes is sometimes regarded as the father figure of

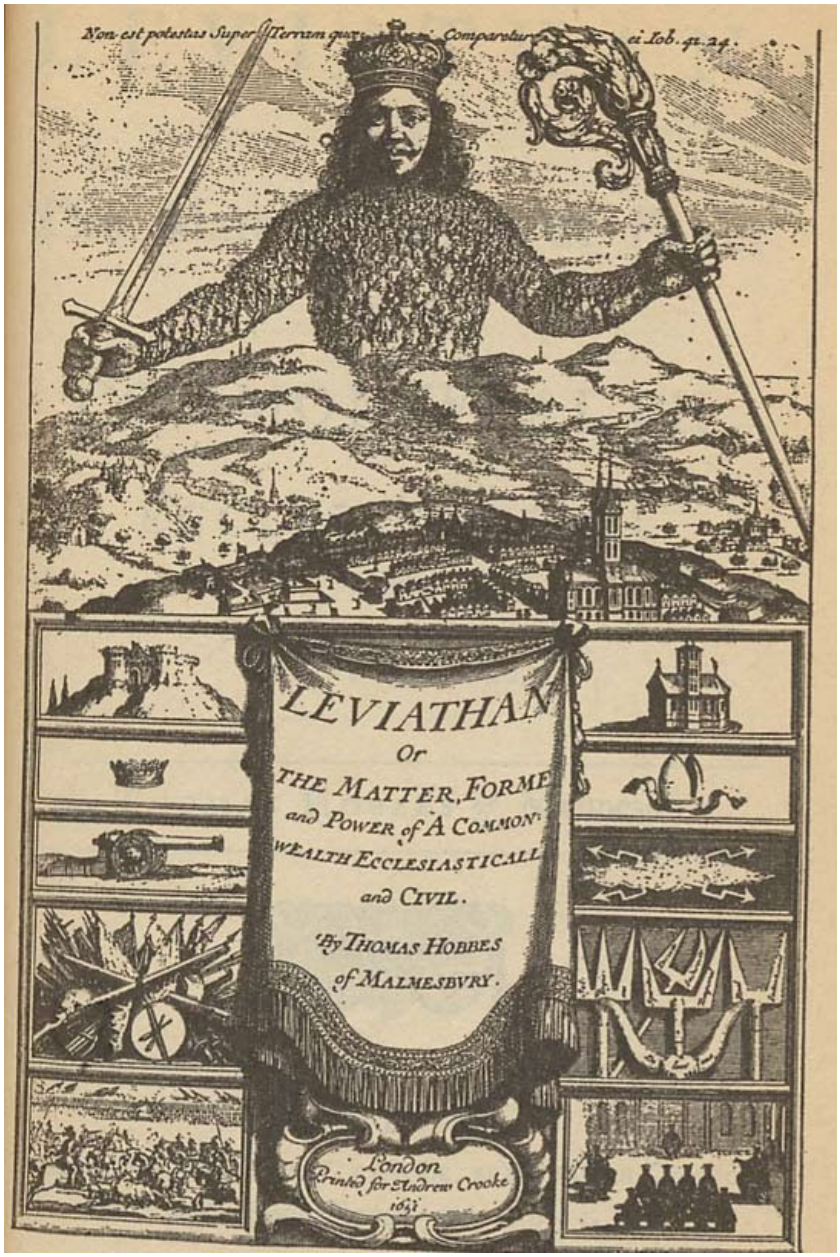
[1] Hobbes was born when on 5 April 1588 the news that the Spanish Armada had set sail shocked the heavily pregnant wife of his father, also called Thomas Hobbes, a rather disreputable and drunkard vicar of Westport, into labour. The new Thomas Hobbes was later to state: 'My mother dear did bring forth twins at once, both me, and fear'. Philosophical liberalism was in a real sense founded upon this emotion, and upon Hobbes' desire to preserve his earthly domain against the prospect of death.

Most of Hobbes' adult life was spent as tutor and secretary to the Cavendishes, Earls of Devonshire. Scholars have noted how the life experiences of Hobbes (as with John Locke) were exempt from the customary familial relationships; Hobbes lived a life more of contract than affection. Although he was courageous in the writing of unpopular ideas, Hobbes took pride in his efforts to escape any form of physical danger. As well as his self-imposed exile in France while the civil war raged in England, he regularly took large quantities of spirits and threw up to 'cleanse the system' (although he despised drunkenness), played tennis, sang at the top of his voice to exercise his lungs and exorcise the spirits, and even washed regularly (a rather unusual habit at the time!). He gave up eating red meat in middle age ... And in an age not noted for the length of the average life expectancy, he lived to be 91. Hobbes believed that through knowledge of the real human condition we could prolong individual and social life. Understanding the role of law was crucial and here Hobbes developed the idea of law as convention, and society as an artefact – ideas rather submerged in earlier writings.

totalitarian government and as presenting an unnecessarily pessimistic and solitary view of the human condition (also feminists do not like his images for he begins with an idea of **solitary men**, not of people living in families; feminists point out that humans do not begin life as individuals – they begin life as dependent babies and are made into individuals by socialisation). Hobbes certainly highlights the necessity to obey strong government; he argues for a sovereign authority which wields supreme power, to save men from the evils of the 'state of nature' in which man's essentially egoistical nature means that life is a 'war of all on all'. Hobbes is also regarded as the first political philosopher who developed his theory on 'materialist' foundations, which means he took a strictly 'scientific' view of humans and their place in the world.

### 3.1.2 Reading a text – *Leviathan* – in context

We say that to study jurisprudence and legal theory you should read the original texts. Following are extracts from *Leviathan*.[2] But of course simply to present the text is off-putting and difficult to focus upon. What should you be looking for?




Hobbes put this text together in the period 1648–51. His target audience was a very small group of people; in particular, members

[2] We can not reproduce the experience that Hobbes wanted to achieve from his intended audience. Imagine you are opening the text. The first thing that confronts you is an image. First the 'we' that I am referring to is not the audience that Hobbes had in mind. In fact of course you and I are probably located in different parts of the globe. I (WM) am a white male of New Zealand background living in London; my frame of reference is inescapably global. Given the huge range of people who study law through the external system of the University of London, you may range in age from 21 to 70+, and be of almost any range of ethnicity, location and religious orientation.

of the exiled Royal English Court in France and other leading individuals in England. What was the background to his writing? Hobbes wrote at the time of the passing of the superordinate authority of the Christian church, where religious authority, instead of being a binding force, had itself become a major source of conflict in Europe. What should replace the claims to loyalty of religious brotherhood (and religiously orientated Natural Law) or localised feudal relations? The Thirty Years' War, the bitterest European conflict yet seen, had laid waste to much of central Europe and drastically reduced the German-speaking population, among others. Few people thought 'globally' as we mean it today; but, using our current language, the major blocs of that time appear as a divided European Christendom, with the strongest powers being the Chinese Empire, localised in its concerns, and the Islamic Ottoman Empire, somewhat at odds with Islamic Persia. For centuries Islam, not Christian Europe, had been the place of learning, providing a world civilisation, polyethnic, multiracial and spread across large sections of the globe.

This was also a time when the great voyages of European discovery were merging into the imperialist projects that have fashioned much of the political and social contours of the modern world. Christian Spain finally destroyed the last Muslim (Moorish) enclave – the Emirate of Granada – in 1492, in the aftermath of which Columbus was allowed to sail in search of a new route to India. From that time, the ships and military power of Europeans entered into the wider realms of the globe, overwhelming cultures and peoples that could not withstand the onslaught, creating new social and territorial relations in a European image. Driving this world shift in power was an existential perspective on life itself. Hobbes postulated the basis of the social bond – in place of dynasties, religious tradition or feudal ties – as rational self-interest exercised by calculating individuals. As bearers of subjective rationality, individuals were depicted as forming the social order and giving their allegiance to a government, a sovereign, because it was in their rational self-interest to do so; thus the metaphor for the social bond he offered was contractual, not an image of traditional or feudal ties. The sovereign was now to have a particular **territory**, which many have rather loosely termed the 'nation-state' – you may note that the Treaty of Westphalia, usually referred to in international relations or political sociology as beginning the era of the nation state, had been concluded in 1648.

### Activity 3.1 Reading Hobbes

Read the extract from *Leviathan* that follows. You may find it difficult to begin with, as the English language has changed a good deal in the last 350 years.

1 Consider the picture of the human condition that Hobbes presents: do you find it realistic?

2 How apt is the idea of a social contract to found the legitimacy of modern government?

3 Should ensuring social survival be the basic aim of the law (note how this influences the 'minimum content of natural law' argument used by H.L.A. Hart) or should the law help direct the conditions for human flourishing?

Write notes on these questions as you proceed.

No feedback provided.

## Leviathan Extract 1: The introduction

NATURE (the Art whereby God hath made and governs the world) is by the *Art* of man, as in many other things, so in this also imitated, that it can make an Artificial Animal. For seeing life is but a motion of Limbs, the beginning whereof is in some principal part within; why may we not say that all *Automata* (Engines that move themselves by springs and wheels as doth a watch) have an artificial life? For what is the *Heart*, but a *Spring,* and the *Nerves,* but so many *Strings*; and the *Joints*, but so many *Wheels*, giving motion to the whole body such as was intended by the Artificer? Art goes yet further, imitating that rational and most excellent work of nature, *Man*. For by art is created that great LEVIATHAN called a COMMON-WEALTH, or STATE (in Latin, CIVITAS) which is but an Artificial Man; though of greater stature and strength than the Natural, for whose protection and defence it was intended; and in which the *Sovereignty* is an Artificial *Soul*, as giving life and motion to the whole body. The *Magistrates*, and other *Officers* of Judicature and Execution, artificial *Joints*; *Reward* and *Punishment* (by which fastened to the seat of the Sovereignty, every joint and member is moved to perform his duty) are the *Nerves*, that do the same in the body natural; the *Wealth* and *Riches* of all the particular members are, the *Strength*; *Salus Populi* (the *peoples safety*) its *business*; *counselors*, by whom all things needful for it to know, are suggested unto it, are the *Memory*; *Equity* and *Laws*, an artificial *Reason* and *will*; *concord*, *health*; *sedition*, *sickness*; and *civil war*, *death*. Lastly, the *Pacts* and *Covenants*, by which the parts of this body politic were at first made, set together, and united, resemble that *Fiat*, or the *Let us make man*, pronounced by God in the creation.

To describe the nature of this artificial man, I will consider

First, the *Matter* thereof, and the *Artificer*, both which is *Man*.

Secondly, *How*, and by what *Covenants* it is made; what are the *Rights* and *just Power* or *Authority* of a *Sovereign*, and what it is that *preserveth* and *dissolveth* it.

Thirdly, what is a *Christian Common-wealth*.

Lastly, what is the *Kingdom of Darkness*.

Concerning the first, there is a saying much usurped of late, that *wisdom* is acquired, not by reading of *books*, but of men. Consequently whereunto, those persons that for the most part can give no other proof of being wise, take great delight to show what they think they have read in men, by uncharitable censures of one another behind their backs. But there is another saying not of late understood, by which they might learn truly to read one another, if they would take the pains; and that is, *Nosce te ipsum*, *Read thyself*: which was not meant as it is now used to countenance either the barbarous state of men in power towards their inferiors; or to encourage men of low degree to a saucy behaviour towards their betters; but to teach us that for the similitude of the thoughts, and passions of one man, to the thoughts and passions of another. Whosoever looketh into himself and considereth what he doth, when he does *think, opine, reason, hope, fear,* etc., and upon what grounds, he shall thereby read and know what are the thoughts and passions of all other men, upon the like occasions. I say the similitude of passions, which are the same in all men, *desire, fear, hope*, etc.; not the similitude of objects of the passions, which are the things *desired, feared, hoped*, etc: for these the individual constitution and particular education do so vary, and they are so easy to be kept from our knowledge that the characters of man's heart, blotted and confounded as they are with dissembling, lying,

counterfeiting, and erroneous doctrines, are legible only to him that searcheth hearts. And though by men's actions we do discover their design sometimes, yet to do it without comparing them with our own and distinguishing all circumstances by which the case may come to be altered, is to decipher without a key, and be for the most part deceived by too much trust or by too much diffidence; as he that reads is himself a good or evil man.

But let one man read another by his actions never so perfectly, it serves him only with his acquaintance, which are but few. He that is to govern a whole Nation must read in himself not this or that particular man, but mankind: which though it be hard to do, harder than to learn any language or science; yet, when I shall have set down my own reading orderly and perspicuously, the pains left another will be one to consider, if he also finds not the same in himself. For this kind of doctrine admitteth no other demonstration...

…whatsoever is the object of any man's appetite or desire, that is it which he, for his part, calleth *Good*: And the object of his hate, and aversion, *Evil*; and of his contempt, *Vile* and *Inconsiderable*. For these words of Good, Evil, and Contemptible are ever used with relation to the person that useth them: There being nothing simply and absolutely so; nor any common Rule of Good and Evil, to be taken from the nature of the objects themselves; but from the person of the man (where there is no Common-wealth); or (in a Common-wealth), from the person that representeth it, or from an Arbitrator or Judge, whom men disagreeing shall by consent set up and make his sentence the Rule thereof…

So much for the introduction, now for Hobbes' narrative of the natural condition of mankind.

## Leviathan Extract 2: CHAPTER XIII

### Of the NATURAL CONDITION of Mankind, as concerning their felicity,[3] and Misery

[3] Felicity = happiness (from Latin *felix* = happy).

Nature hath made men so equal in the faculties or body and mind as that though there be found one man sometimes manifestly stronger in body or of quicker mind than another; yet when all is reckoned together, the difference between man and man, is not so considerable as that one man can thereupon claim to himself any benefit, to which another may not pretend as well as he. For as to the strength of body, the weakest has strength enough to kill the strongest either by secret machination or by confederacy with others that are in the same danger with himself.

And as to the faculties of the mind, (setting aside the arts grounded upon words, and especially that skill of proceeding upon general and infallible rules called Science; which very few have and but in few things; as being not a native faculty, born with us; nor attained (as Prudence), while we look after somewhat else). I find yet a greater equality amongst men than that of strength. For prudence is but experience; which equal time equally bestows on all men, in those things they equally apply themselves unto. That which may perhaps make such equality incredible is but a vain conceipt of ones own wisdom, which almost all men think they have in a greater degree than the Vulgar; that is, than all men but themselves and a few others, whom by fame or for concurring with themselves, they approve. For such is the nature of men that howsoever they may acknowledge many others to be more witty, or more eloquent or more learned; yet they will hardly believe there be many so wise as

themselves: For they see their own wit at hand and other men's at a distance. But this proveth rather that men are in that point equal, than unequal. For there is not ordinarily a greater sign of the equal distribution of anything, than that every man is contended with his share.

From this equality of ability, ariseth equality of hope in the attaining of our Ends. And therefore if any two men desire the same thing,[4] which nevertheless they cannot both enjoy, they become enemies; and in the way to their end (which is principally their own conservation, and sometimes their delectation only), endeavour to destroy or subdue one another. And from hence it comes to pass that where an Invader hath no more to fear than another man's single power; if one plants, sows, builds, or possesses a convenient seat,[5] others may probably be expected to come prepared with forces united to dispossess and deprive him not only of the fruit of his labour, but also of his life or liberty. And the Invader again is in the like danger of another.

[4] 'Desire the same thing': 'thing' in a material sense, such as an object or asset.

[5] 'Convenient seat': attractive mansion or estate.

And from this diffidence of one another, there is no way for any man to secure himself so reasonably as Anticipation; that is, by force or wiles, to master the persons of all men he can, so long, till he sees no other power great enough to endanger him: And this is no more than his own conservation required, and is generally allowed. Also because there be some that taking pleasure in contemplating their own power in the acts of conquest, which they pursue farther than their security requires; if others, that otherwise would be glad to be at ease within modest bounds, should not by invasion increase their power, they would not be able, long time, by standing only on their defence, to subsist. And by consequence, such augmentation of dominion over men being necessary to a man's conservation, it ought to be allowed him.

Again, men have no pleasure (but on the contrary a great deal of grief) in keeping company, where there is no power able to over-awe them all. For every man looketh that his companion should value him at the same rate he sets upon himself: And upon all sign of contempt, or undervaluing, naturally endeavours, as far as he dares (which amongst them that have no common power to keep them in quiet, is far enough to make them destroy each other), to extort a greater value from his contemners by dommage; and from others, by the example.

So that in the nature of man, we find three principal causes of quarrel. First: Competition; Secondly: Diffidence; Thirdly: Glory.

The first, maketh men invade for Gain; the second, for Safety; and the third, for Reputation. The first uses Violence to make themselves masters of other men's persons, wives, children, and chattel; the second, to defend them; the third, for trifles as a word, a smile, a different opinion, and any other sign of undervalue, either direct in their persons or by reflexion in their kindred, their friends, their nation, their profession or their name.

Hereby it is manifest that during the time men live without a common power to keep them all in awe, they are in that condition which is called War; and such a war as is of every man against every man. For war consists not in battle only or the act of fighting; but in a tract of time, wherein the Will to contend by battle is sufficiently known and therefore the notion of Time is to be considered in the nature of war; as it is in the nature of weather. For as the nature of foul weather lies not in a shower or two of rain but in an inclination thereto of many days together, so the nature of war consists not in actual fighting but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is PEACE.

Whatsoever therefore is consequent to a time of war, where every man is enemy to every man; the same is consequent to the time wherein men live without other security, than what their own strength and their own invention shall furnish them with. In such condition, there is no place for Industry because the fruit thereof is uncertain and consequently no culture of the earth; no navigation nor use of the commodities that may be imported by sea; no commodious building; no instruments of moving and removing such things as require much force; no knowledge of the face of the earth; no account of time; no arts; no letters; no society; and which is worst of all, continual fear and danger of violent death; And the life of man, solitary, poor, nasty, brutish, and short.[6]

[6] 'Solitary, poor, nasty, brutish, and short': these are perhaps the most famous words in the history of English political philosophy.

It may seem strange to some man that has not well weighed these things that nature should thus dissociate and render men apt to invade and destroy one another: and he may therefore, not trusting to this inference made from the passions, desire perhaps to have the same confirmed by experience. Let him therefore consider with himself when taking a journey, he arms himself and seeks to go well accompanied; when going to sleep, he locks his doors; when even in his house he locks his chests; and this when he knows there be laws and public officers, armed, to revenge all injuries shall be done him; what opinion he has of his fellow subjects when he rides armed; of his fellow citizens when he locks his doors; and of his children and servants when he locks his chests. Does he not there as much accuse mankind by his actions, as I do by my words? But neither of us accuse man's nature in it. The Desires, and other passions of man are, in themselves, no sin. No more are the actions that proceed from those passions, till they know a law that forbids them: which till laws be made they cannot know, nor can any law be made till they have agreed upon the person that shall make it.

It may, per adventure,[7] be thought there was never such a time nor condition of war as this, and I believe it was never generally so, over all the world: but there are many places where they live so now. For the savage people in many places of America, except the government of small families, the concord whereof dependeth on natural lust, have no government at all; and live at this day in that brutish manner, as I said before. Howsoever, it may be perceived what manner of life where would be, where there were no common power to fear; by the manner of life, which men that have formerly lived under a peaceful government use to degenerate into, in a civil war.

[7] 'Per adventure' = perhaps.

But though there had never been any time wherein particular men were in a condition of war one against another; yet in all times, kings, and persons of sovereign authority because of their independence, are in continual jealousies and in the state and posture of gladiators; having their weapons pointing, and their eyes fixed on one another; that is, their forts, garrisons, and guns upon the frontiers of their kingdoms; and continually spy upon their neighbours which is a posture of war. But because they uphold thereby, the industry of their subjects, there does not follow from it that misery which accompanies the liberty of particular men.

To this war of every man against every man, this also is consequent; that nothing can be unjust. The notions of Right and Wrong, Justice and Injustice have there no place. Where there is no common power, there is no law: where no law, no injustice. Force, and fraud are in war, the two cardinal virtues. Justice and injustice are none of the faculties neither of the body nor mind. If they were, they might be in a man that were alone in the world as well as his senses and passions. They are qualities that relate to men in society, not in solitude. It is consequent also to the same condition, that there be

> no propriety, no dominion, no *Mine* and *Thine* distinct; but only that to be every man's that he can get; and for so long as he can keep it. And thus much for the ill condition, which man by mere nature is actually placed in; though with a possibility to come out of it, consisting partly in the passions, partly in his reason.
>
> The passions that incline men to peace, are fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them. And reason suggests convenient articles of peace, upon which men may be drawn to agreement. These articles are they, which otherwise are called the laws of nature: whereof I shall speak more particularly, in the two following chapters.

In the subsequent chapters Hobbes sets up his key figure of the **sovereign**, who lays down the conditions for human flourishing, or individual pursuit of desire by a set of rules or commands which were laws. But note: Hobbes does not say that the sovereign makes laws because of power alone: 'law, properly, is the word of him that **by right** hath command over others' (*Leviathan*, Chapter 15, emphasis added). Hobbes' narrative of the human condition and the need for man to set up a common authority leads to the social contract which authorises the sovereign. Hobbes combated divided attention; he argued that people had come to obey too many factors and were swayed by various customs, traditions, religious beliefs, visible powers of their immediate secular rulers, feudal ties and numerous fears. Since these pulled in different directions, chaos resulted. Having given his narrative of the state of nature, Hobbes has us set up a sovereign, a 'mortal God' out of our commonly agreeing to a social contract. The sovereign – or as some more loosely call it, the state – was to make possible the emergence of a new community, one of rational individuals agreeing upon a common power to set the rules of the social games of individualist pursuit of desire and rational self-interest.

### 3.1.3 Hobbes: context and influence

In Hobbes we have many of the basic characteristics of legal positivism. Law is something posited by man, it does not flow from God's creation. Therefore the relationship between a legal enactment and morality is not straightforward. Does an enactment or decision by judges need to be moral for it to be accepted as valid law? Hobbes would appear to say no: it is a matter of sanctions, of the power to enforce the positively laid down legal statement (in his lifetime the great common law judge Sir Mathew Hale tried to defend the traditions of the common law against Hobbes by arguing, in part, that the common law contained accumulated wisdom, while the image of law as the commands of the sovereign would encourage *ad hoc* decision-making or grand political agendas. The power of legislative reason emerged really in the nineteenth century when Bentham and others saw in the law an instrument of rational rule, to be used by the political masters and guided by a secure ethical philosophy – utility).

Many commentators have put the 'Hobbesian problem' as the basic question of social organisation in the 'modern' era. As Stephen Collins[8] puts it:

> Hobbes understood that a world in flux was natural and that order must be created to restrain what was natural … Society is no longer a transcendentally articulated reflection of something predefined,

[8] Collins, S. *From Divine Cosmos to Sovereign State: An Intellectual History of Consciousness and the Idea of Order in Renaissance England* (Oxford: Oxford University Press, 1989) [ISBN 019505458X] pp. 28–29).

> external, and beyond itself which orders existence hierarchically. It is now a nominal entity ordered by the sovereign state which is its own articulated representative…
>
> [Forty years after the death of Queen Elizabeth I] order was coming to be understood not as natural, but as artificial, created by man, and manifestly political and social… Order must be designed to restrain what appeared ubiquitous (that is flux)… Order became a matter of power, and power and matter of will, force and calculation… Fundamental to the entire reconceptualization of the idea of society was the belief that the commonwealth, as was order, was a human creation.

But how is the state going to rule? What should guide the state?

This is the continuing problem of establishing a rational political philosophy. Note that Bentham – and Austin after him – thought they had found the answer in utilitarianism. The question was not so easily solved, however, and is a fertile ground for theorising.

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**Activity 3.2**

**Reading a contemporary theorist: H.L.A. Hart**

In the extracts from Hobbes we have looked at his version of the natural condition of humanity. Hobbes presents a strictly materialist conception of mankind and then a narrative of the 'natural condition of man' that served to found his political philosophy. H.L.A. Hart develops a modern version influenced by Hobbes (and also the eighteenth-century Scottish philosopher David Hume) in Chapter IX of the *Concept of Law*.

Read Hart, *The Concept of Law*, Chapter IX, particularly pp. 193–200, and make notes on the following questions as you do so:

1 How successful is Hart's invocation of the minimum condition of natural law?

2 How convincing do you find his 'truisms'?

3 To what extent does Hart simply follow Hobbes and where does he add to Hobbes' narrative of the human condition?

Feedback: you will find all the feedback you need in section 3.1.4 below.[9]

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[9] **Do not read on** until you have finished reading Hart's chapter and making the notes for this activity.

## 3.1.4 Understanding Hart's analysis of the human condition

Many have offered their own narratives of the basic human condition. An early version is in Plato's dialogue *Protagoras*. Plato includes references to a god (Zeus, the principal god of the Greeks) and a lesser god (Hermes), which is not made by Hart. (The writing is deliberately allegorical, and the references to the then conventional gods were meant to be demythologised.)

> Men lived at first in scattered groups … They were devoured by wild beasts, since they were in all respects weaker … They sought to protect themselves by coming together and building fortified cities; but when they began to gather in communities they could not help injuring one another in their ignorance of the arts of co-operative living. Zeus, therefore, fearing the total destruction of the race, sent Hermes to impart to men the qualities of respect for

> others and a sense of justice … (Hermes asks whether justice and respect should be imparted unequally, like the skilled arts, or equally to all alike.) Equally (said Zeus). There could never be societies if only a few shared these virtues. Moreover, you must lay it down as my law that if anyone is found incapable of acquiring his share of these virtues he shall be put to death as a disease in society.

By contrast to the way Hobbes is often read, Protagoras makes it quite clear that the story about primitive men coming together in a 'social contract' is **only** a story. He is not implying for a moment that there ever actually was Hobbes's nasty, brutish and short-lived savage (or a noble one, for that matter); whether he believed in the Homeric Gods is another matter. It is an orientating narrative, an intellectual device used to get a basis for further discussion.

Note that Hart follows Protagoras and Hobbes putting the survival of human society as the necessary and basic aim: 'Our concern is with social arrangements for continued existence, not with those of a suicide club.' He continues:

> We wish to know whether, among these social arrangements, there are some which may be illuminating ranked as *natural laws discoverable by reason,* and what their relation is to *human law and morality* … Reflection on some very obvious generalisations – indeed truisms – concerning human nature and the world in which men live, show that as long as these hold good, there are certain rules of conduct which any social organisation must contain *if it is to be viable*. Such rules do in fact constitute a common element in the *law and conventional morality* of all societies … where these are distinguished as different forms of social control. With them are found, both *in law and in morals*, much that is peculiar to a particular society and much that may seem arbitrary and a mere matter of choice. Such universally recognised principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and their aims, may be considered the *minimum content* of Natural Law.' (*The Concept of Law*, pp. 192–93)

There are a number of interesting points in this passage:

1 Hart constantly (three times in this quotation) brackets law with ('conventional') morality, meaning by morality here what Austin called positive morality.

2 Having indicated conventional morality logically he assumes that there is an unqualified Morality, and this Hart calls natural law, and it is the **common content** (i.e. a common factor) both of the various positive moralities and of the various systems of law.

3 Hart tells us that there is this common content, and tells us what it is; he also offers an **explanation** of how he knows what it is. (It is 'discoverable by reason'.)

4 His explanation (or discovery) of the connection between the basic and necessary aim, the truisms and his conclusions is founded upon two fundamental principles, namely:

- that societies **survive** (they are not 'suicide clubs')
- that there are certain characteristic features of human beings as a species of organism on the earth, and certain features of our earthly environment, that we all share (the 'truisms').

5 His conclusion, or justification of the necessity for rules, takes the form of a logical demonstration, such that, given those features of

human beings and the environment, human society **cannot survive unless** human beings accept certain constraints on their behaviour. These constraints are what Hart terms **minimum content of natural law**. Given the truisms, certain restrains and rules are a necessary condition of the survival of human society.

What of the so-called truisms themselves – what is meant by calling them truisms? Three things: (1) they are true; (2) they are self-evidently true; but (3) they may be either so obvious that we simply take them for granted and do not see their significance, or they are not at first sight **obvious**; in both cases we need to state them clearly.

The truisms which lead to Hart's 'minimum content of natural law' can be classified as biological, behavioural and environmental. Hart lists five, but only two of these lead to any particular **content** in morals; the other three lead to various other features of morality which may be called 'formal' for the present. The two which lead to a specific content are human vulnerability and limited resources.

### Human vulnerability

This exists in a dialectical relation with a complementary feature, namely **destructive power**: a human capacity and readiness to hurt. Thus the truism is that man is by nature capable of receiving, and of inflicting, serious bodily injury and death. This is said to be connected with the universally prevalent prohibitions on killing and injuring, except in closely specified circumstances. The necessity for the connection can be understood if we imagine a very different natural condition for man: if, for instance, we were heavily armour-plated, and so incapable of being damaged; or if we were immobile, like plants, and so incapable of wielding weapons or moving to attack. Rules against killing or maiming might still exist in these altered conditions, but they would no longer be **necessary**.

### Limited resources

The fact that the basic necessities of life are always in short supply makes inevitable some form of property institution (not necessarily, of course, an individualist or capitalist property system), together with a set of rules governing the exchange of property, that is, contracts and promises. Again, the necessity of this can be understood by imagining natural conditions in which human beings never needed to labour to produce and conserve their resources in order to survive: if, for instance, they could extract their food from the air (like the Biblical 'lilies of the field').

### The other three truisms

Hart's other truisms do not lead to any particular content:

- **Approximate equality** (no man is enormously stronger than another) which makes generally acceptable a common system of mutual forbearances and compromise. (Morality does not operate between nations, just because nations are not even approximately equal; and it operates very imperfectly in political relations, for the same reason: as in the case of electoral promises.)
- **Limited altruism** (men are not devils, but neither are they angels) explains the necessity of restraints, and at the same time their possibility.

- **Limited understanding and strength of will** makes it necessary to apply sanctions, including here the informal sanctions of moral disapproval, as an artificial incentive to conformity for those whose own reason or self-control are insufficient.

To evaluate Hart's thesis of a minimum content to natural law, one must be careful to see just what it is claiming. In one respect it is quite modest, in another ambitious. It is modest in scope, because it is explicitly concerned only with what it calls the **minimum** content of morality; as far as we have seen, it seems to be restricted to rules governing matters of life and death, injury, property and contracts. Further, these rules are all **prohibitive**: there is no positive inducement to act in virtuous ways, only inhibitions against wrongdoing. Thirdly, only **primary** rules are dealt with; nothing is said about those special circumstances in which it may be permissible, or even mandatory, to destroy life, inflict bodily harm, deprive of possession or break a promise; and all or most of these things are generally sometimes held to be morally justifiable.

The reasons for these limitations are fairly obvious. The first limitation – the restricted range of topics – is explained by the fact that only one basic aim – that of survival – is considered. (Even this concept was one of **social**, not individual, survival, as we see from the end of the quotation from Plato's *Protagoras*. Perhaps the two are sufficiently close for us to downplay the distinction for these purposes.) So any moral rules which are not directly concerned with survival will not be covered. And this is exactly what we should expect – after all, survival is the **basic** aim, because if this aim is not achieved, no others can be. Only survivors can be do-gooders. But it is quite open to the natural law theorist to introduce other, less basic aims, to explain other areas of moral control – and still remain within the area of universally recognised principles, rather than regional variations. An obvious case would be the moral (and legal) controls on mating and procreation. It is noticeable that there are no sexual restraints in Hart's list, even though such restraints are in fact universal in all societies. The reason why they are not in Hart's list is because such things as sexual promiscuity, incest or adultery are not **obviously** incompatible with survival, as promiscuous killing would be.

However, this may be a reflection of the limited sociology of Hart's account in the *Concept*. Most anthropologists have put the incest prohibition at the foundation of 'natural' morality. From Levi Strauss to the reflections of Freud, the prohibition is seen as the starting point of social organisation, trade and inter-group interaction.

### Activity 3.3

At this stage, try drafting an answer to this past examination question:

'Hart says that all legal systems will contain a "minimum content" of morality. Why did he think it was necessary to concede this to the natural lawyers? Are his arguments for the minimum successful?'

Feedback: see page 59.

**Useful further reading on Hobbes**

- Morrison: *Jurisprudence: from the Greeks to Post-modernity*, Chapter 4: 'Thomas Hobbes and the origins of the imperative theory of law: or *mana* transformed into earthly power'.

## 3.2 Jeremy Bentham

If Hobbes had argued for the idea of legislative rationality – the government taking responsibility for organising the nature of civil society and the structures of everyday interaction and using the law to do so – Bentham assumed both that this was possible and that it was the **responsibility and the duty** of government.

Jeremy Bentham was the son of a London attorney and was first educated at the elite Westminster School before being sent off – at the age of 12! – to Oxford University (Queen's College) where he attended lectures on the English common law given by William Blackstone, a noted university teacher, lawyer, sometime MP and later judge. From 1763, he studied law at Lincoln's Inn and was called to the Bar in 1772. Bentham later stated that he instantly recognised Blackstone's mistakes in his lectures when Blackstone claimed that the common law reflected the liberties of the English subject and was founded upon ideas of natural rights; these Bentham called 'nonsense on stilts'. Bentham's major writings on law begin with criticism of the approach taken by Blackstone which Blackstone had published in his *Commentaries on the Laws of England* (first edition published 1765–69). Blackstone hoped the *Commentaries* would provide a map for studying the common law and whatever the criticisms of his logic he was correct as to the influence of his work: the *Commentaries* were a fantastically successful text going through over 40 editions, and were largely responsible for the USA remaining a common law country after independence in 1776. Bentham thought Blackstone's analysis was deficient, as it portrayed the common law as growing organically, containing the wisdom of past decisions and not did not consider the social impact of the law nor did it offer an image of the law as an instrument of governmental power (he considered that Blackstone was an apologist for the *status quo*).

Bentham was a reformer[10] and to this end he differentiated the question of what the law was from the question of what the law ought to be. The 'ought' part was answered by the key criterion of judging – or as he put it, the 'sacred truth' – that 'the greatest happiness of the greatest number is the foundation of morals and legislation'. 'Enlightened self-interest' provided the key to understanding ethics, so that a person who always acted with a view to his own maximum satisfaction in the long run would always act rightly.

In his *Introduction to the Principles of Morals and Legislation* (1789), Bentham strove 'to cut a new road through the wilds of jurisprudence' so that the greatest happiness of the greatest number was to govern our judgment of every institution and action.

You may also note that Bentham was the proponent of a total institution called the *panopticon*. This was to be an institution of perfect control and visibility; the inmate was to be constantly under the gaze of the overseer. To many this was the perfect emblem of

[10] In his later life a group of people around Bentham tried to create a university to adopt the utilitarian stance and provide a counter to Oxford and Cambridge. These 'Godless heathens of Gower street' as one critic labelled them, were refused permission, although they founded University College London. In his will Bentham left his body to the institution, on condition that after it was publicly dissected and used for medical display; it would form an 'auto-icon' to be permanently displayed.

the dangers of the modernist obsession with legislating, defining, structuring, segregating, classifying and recording.

That the modern city of reason would end in a living prison would certainly not have been Bentham's desire, but the reality of the holocaust and the great imprisonments of the Soviet Union, the re-education camps used elsewhere in the world testify to the dark side of the attempts to define chaos out of social life and define in order with the aim of creating a utopian society. The marriage of modern state power and the claim of acting in defence of the truth needs constant attention (as Weber argued: see Chapter 12).

**Jeremy Bentham, as he can be seen today.**

## 3.3 John Austin

### 3.3.1 Background

As a young man, John Austin's family bought him a junior commission in the army and after five years' service he began to study law in 1812. From 1818 to 1825 he practised, rather unsuccessfully, at the Chancery Bar. Austin was never a practical man but he impressed the circle of people (at the time viewed as philosophical radicals, in part for their programme of reform and

their belief in utilitarianism) around Jeremy Bentham with his powers of rigorous analysis and his uncompromising intellectual honesty. In 1826, when University College London, was founded, he was appointed its first professor of jurisprudence; at the time legal education was almost entirely practical and it was not possible to pursue a university degree in English law. The common law had been the subject of the lectures of William Blackstone at Oxford, which had resulted in his massive *Commentaries on the Law of England*, but even as late as 1874 Dicey could give his inaugural lecture on the theme of 'was English law a fit subject for University education'! To prepare for the classes Austin spent time in Germany studying Roman law and the work of German experts on modern civil law, whose ideas of classification and systematic analysis exerted an influence on him second only to that of Bentham.

Both Austin and his wife Sarah were ardent utilitarians. While much younger, they were friends of Bentham and of James Mill, whose son John Stuart Mill was a student of Austin and later wrote a large review of the full set of lectures Sarah published after Austin's death. The review argued that Austin achieved the application of utilitarianism to law and set out the path for legal reform. A key point for Austin is that to achieve legal reform (and reform of government and social institutions through law) one has to have a very clear understanding of the nature of law itself. The first task was to rid our understanding of law from the confusions and 'mysteries' of the common law tradition. Austin tried to do this by putting 'positive law' into a political framework, taken in considerable part from Hobbes: law was part of the political relations of sovereign and subject. Austin's first lectures, in 1828, were attended by several distinguished men, but he failed to attract students and resigned his chair in 1832. In 1834, after delivering a shorter but equally unsuccessful version of his lectures, he abandoned the teaching of jurisprudence. He was appointed to the Criminal Law Commission in 1833 but, finding little support for his opinions, resigned in frustration after signing its first two reports. In 1836 he was appointed a commissioner on the affairs of Malta. The Austins then lived abroad, chiefly in Paris, until 1848 (when a revolution took place, and they lost most of their money through having to sell their house quickly), after which they settled in Surrey, where Austin became a much more conservative thinker; he died in 1859.

Austin found little success during his life: recognition came afterwards, and in large part is owing to his wife Sarah who gave him great support, both moral and economic (during the later years of their marriage, they lived primarily from her labours as a translator and reviewer); she edited his notes to publish a more complete set of his *Lectures On Jurisprudence* (Austin, 1873). As for his style, read on…

## Lecture I

> The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors. But positive law (or law, simply and strictly so called) is often confounded with objects to which it is related by *resemblance*, and with objects to which it is related in the way of *analogy*: with objects which are *also* signified, *properly* and *improperly*, by the

large and vague expression *law*. To obviate the difficulties springing from that confusion, I begin my projected Course with determining the province of jurisprudence, or with distinguishing the matter of jurisprudence from those various related objects: trying to define the subject of which I intend to treat before I endeavour to analyse its numerous and complicated parts.

A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him. Under this definition are included and without impropriety, several species. It is necessary to define accurately the line of demarcation which separates these species from one another, as much mistiness and …

The whole or a portion of the laws set by God to men is frequently styled the law of nature, or natural law: being, in truth, the only natural law of which it is possible to speak without a metaphor, or without a blending of objects which ought to be distinguished broadly. But, rejecting the appellation Law of Nature as ambiguous and misleading, I name those laws or rules, as considered collectively or in a mass, the *Divine law*, or the *law of God*.

Laws set by men to men are of two leading or principal classes: classes which are often blended, although they differ extremely; and which, for that reason should be severed precisely and opposed distinctly and conspicuously.

Of the laws or rules set by men to men, some are established by political superiors, sovereign and subject: by persons exercising supreme and subordinate government, in independent nations, or independent political societies. The aggregate of the rules thus established or some aggregate forming a portion of that aggregate, the term law, as used simply and strictly is exclusively applied. But, as contra-distinguished to natural law, or to the law of nature (meaning by those expressions, the law of God), the aggregate of the rules established by political superiors is frequently styled *positive* law, or law existing *by position*. As contra-distinguished to the rules which I style *positive morality*, and on which I shall touch immediately the aggregate of the rules, established by political superiors, may also be marked commodiously with the name of *positive law*. For the sake then of getting a name brief and distinctive at once, and agreeably to frequent usage, I style that aggregate of rules or any portion of that aggregate, positive law: though rules which are not established by political superiors, are also positive, or exist by position; if they be rules or laws in the proper signification of …

Closely analogous to human laws of this second class are a set of objects frequently but *improperly* termed *laws*, being rules set and enforced by *mere opinion*, that is, by the opinions or sentiments held or felt by an indeterminate body of men in regard to human conduct. Instances of such a use of the term law are the expressions – 'The law of honour;' 'The law set by fashion;' and rules of this species constitute much of what is usually termed 'International law.'

The aggregate of human laws properly so called belonging to the second of the classes above mentioned, with the aggregate of objects *improperly* but by *close analogy* termed laws, I place together in a common class, and denote them by the term *positive morality*. The name *morality* severs them from *positive law*, while the epithet *positive* disjoins them from the *law of God*. And to the end of obviating confusion, it is necessary or expedient that they should be disjoined from the latter by that distinguishing epithet. For the

name *morality* (or *morals*), when standing unqualified or alone, denotes indifferently either of the following objects, namely, positive morality *as it is*, or without regard to its merits; and positive morality *as it would be*, if it conformed to the law of God, and were therefore deserving of *approbation*.

Besides the various sorts of rules which are included in the literal acceptation of the term law, and those which are by a close and striking analogy, though improperly, termed laws. There are numerous applications of the term law, which rest upon a slender analogy and are merely metaphorical or figurative. Such is the case when we talk of laws observed by the lower animals; of laws regulating the growth or decay of vegetables; of laws determining the movements of inanimate bodies or masses. For where *intelligence* is not, or where it is too bounded to take the name of *reason* and, therefore, is too bounded to conceive the purpose of a law, there is not the *will, which* law can work on or which duty can incite or restrain. Yet through these misapplications of a *name*, flagrant as the metaphor is, has the filed of jurisprudence and morals been deluged with muddy speculation.

[Having] suggested the *purpose* of my attempt to determine the province of jurisprudence: to distinguish positive law, the appropriate matter of jurisprudence, from the various objects to which it is related by resemblance, and to which it is related nearly or remotely by a strong or slender analogy: I shall [now] state the essentials of *a law* or *rule* (taken with the largest signification which can be given to the term *properly*).

Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*. Or rather, laws or rules, properly so called, are a *species* of commands.

Now, since the term *command* comprises the term law, the first is the simpler as well as the larger of the two. But, simple as it is, it admits of explanation. And, since it is the *key* to the sciences of jurisprudence and morals, its meaning should be analysed with precision.

Accordingly, I shall endeavour, in the first instance, to analyse the meaning of '*command*': an analysis which I fear will task the patience of my hearers but which they will bear with cheerfulness or, at least, with resignation, if they consider the difficulty of performing it. The elements of a science are precisely the parts of it which are explained least easily. Terms that are the largest and, therefore, the simplest of a series are without equivalent expressions into which we can resolve them *concisely*. And when we endeavour to *define* them or to translate them into terms which we suppose are better understood, we are forced upon awkward and tedious circumlocutions.

If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the *expression* or *intimation* of your wish is a *command*. A command is distinguished from other signification of desire, not by the style in which the desire is signified, but by the power and the purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. If you cannot or will not harm me in case I comply not with your wish, the expression of your wish is not a command, although you utter your wish in imperative phrase. If you are able and willing to harm me in case I comply not with your wish, the expression of your wish amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request. '*Preces erant, sed quibus contradici*

*non posset*.' Such is the language of Tacitus, when speaking of a petition by the soldiery to a son and lieutenant of Vespasian.

A command then is a signification of desire. But a command is distinguished from other signification of desire by this peculiarity: that the party to whom it is intended is liable to evil from the other, in case he complies not with the desire.

Being liable to evil from you if I comply not with a wish, which you signify, I am *bound* or *obliged* by your command, or I lie under a *duty* to obey it. If, in spite of that evil in prospect, I comply not with the wish which you signify, I am said to disobey your command, or to violate the duty which it imposes.

Command and duty are, therefore, correlative terms: the meaning denoted by each being implied or supposed by the other. Or (changing the expression) wherever a duty lies, a command has been signified; and wherever a command is signified, a duty is imposed.

Concisely expressed, the meaning of the correlative expressions is this. He who will inflict an evil in case his desire be disregarded, utters a command by expressing or intimating his desire: He who is liable to the evil in case he disregard the desire, is bound or obliged by the command.

The evil which will probably be incurred in case a command be disobeyed or (to use an equivalent expression) in case a duty be broken, is frequently called a *sanction*, or an *enforcement of obedience*. Or (varying the phrase) the command or the duty is said to be *sanctioned* or *enforced* by the chance of incurring the evil.

Considered as thus abstracted from the command and the duty which it enforces, the evil to be incurred by disobedience is frequently styled a *punishment*. But, as punishments, strictly so called, are only a *class* of sanctions, the term is too narrow to express the meaning adequately.

It appears from what has been premised that a law, properly so called, may be defined in the following manner.

A law is a command which obliges a person or persons.

But, as contra-distinguished or opposed to an occasional or particular command, a law is a command which obliges a person or persons, and obliges generally to acts or forbearances of a *class*.

In language more popular but less distinct and precise, a law is a command which obliges a person or person to a *course* of conduct…

It appears from what he has been premised, that a law, properly so called, may be defined in the following manner.

A law is a command which obliges a person or persons.

But, as contra-distinguished or opposed to an occasional or particular command, a law is a command which obliges a person or persons, and obliges *generally* to acts or forbearances of a *class*.

In language more popular but less distinct and precise, a law is a command which obliges a person or persons to a *course* of conduct.

Laws and other commands are said to proceed from superiors, and to bind or oblige inferiors. I will, therefore, analyse the meaning of those correlative expressions; and will try to strip them of a certain mystery, by which that simple meaning appears to be obscured.

Superiority is often synonymous with precedence or excellence. We talk of superiors in rank; of superiors in wealth; of superiors in virtue: comparing certain persons with certain other persons; and

meaning that the former precede or excel the latter in rank, in wealth, or in virtue.

But, taken with the meaning wherein I here understand it, the term superiority signifies might: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes.

For example, God is emphatically the superior of man. For His power of affecting us with pain and of forcing us to comply with His will is unbounded and resistless.

To a limited extent, the sovereign One or Number is the superior of the subject or citizen: the Master of the slave or servant, the Father of the child.

In short, whoever can oblige another to comply with his wishes, is the superior of that other, so far as the ability reaches: The party who is obnoxious to the impending evil, being to that same extent, the inferior.

The might or superiority of God, is simple or absolute. But in all or most cases of human superiority, the relation of superior and inferior, and the relation of inferior and superior, are reciprocal. Or (changing the expression) the party who is the superior as viewed from one aspect, is the inferior as viewed from another.

For example, to an indefinite, though limited extent, the monarch is the superior of the governed: his power being commonly sufficient to enforce compliance with his will. But the governed, collectively or in mass, are also the superior of the monarch: who is checked in the abuse of his might by his fear of exciting their anger; and of rousing to active resistance the might which slumbers in the multitude.

A member of a sovereign assembly is the superior of the judge: the judge being bound by the law which proceeds from that sovereign body. But, in his character of citizen or subject, he is the inferior of the judge: the judge being the minister of the law, and armed with the power of enforcing it.

It appears, then, that the term superiority (like the term's duty and sanction) is implied by the term command. For superiority is the power of enforcing compliance with a wish: and the expression or intimation of a wish, with the power and the purpose of enforcing it, are the constituent elements of a command.

'That laws emanate from superiors' is, therefore, an identical proposition. For the meaning, which it affects to impart, is contained in its subject.

If I mark the peculiar source of a given law, or if I mark the peculiar source of laws of a given class, it is possible that I am saying something which may instruct the hearer. But to affirm of laws universally 'that they flow from superiors,' or to affirm of laws universally 'that inferiors are bound to obey them', is the merest tautology and trifling.

According to an opinion which I must notice *incidentally* here, though the subject to which it relates will be treated *directly* hereafter, *customary laws* must be excepted from the proposition 'that laws are a species of commands'.

By many of the admirers of customary laws (and especially of their German admirers), they are thought to oblige legally (independently of the sovereign or state), *because* the citizens or subjects have observed or kept them. Agreeably to this opinion, they are not the *creatures* of the sovereign or state, although the

sovereign or state may abolish them at pleasure. Agreeably to this opinion, they are positive law (or law, strictly so called), inasmuch as they are enforced by the courts of justice: But, that notwithstanding, they exist as *positive* law by the spontaneous adoption of the governed, and not by position or establishment on the part of political superiors. Consequently, customary laws, considered as positive law, are not commands. And, consequently, customary laws, considered as positive law, are not laws or rules properly so called.

An opinion less mysterious, but somewhat allied to this, is not uncommonly held by the adverse party: by the party which is strongly opposed to customary law; and to all law made judicially, or in the way of judicial legislation. According to the latter opinion, all judge-made law, established by *subject* judges, is purely the creature of the judges by whom it is established immediately. To impute it to the sovereign legislature, or to suppose that it speaks the will of the sovereign legislature, is one of the foolish or knavish *fictions* with which lawyers, in every age and nation, have perplexed and darkened the simplest and clearest truths.

I think it will appear, on a moment's reflection, that each of these opinions is groundless: that customary law is *imperative,* in the proper signification of the term; and that all judge-made law is the creature of the sovereign or state.

At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts, and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects; but deriving the only force, which it can be said to possess, from the general dis-approbation falling on those who transgress it.

Now when judges transmute a custom into a legal rule (or make a legal rule not suggested by a custom), the legal rule which they establish is established by the sovereign legislature. A subordinate or subject judge is merely a minister. The portion of the sovereign power which lies at this disposition is merely delegated. The rules which he makes derive their legal force from authority given by the state: an authority which the state may confer expressly, but which it commonly imparts in the way of acquiescence. For, since the state may reverse the rules which he makes, and yet permit him to enforce them by the power of the political community, its sovereign will 'that his rules shall obtain as law' is clearly evinced by its conduct, though not by its express declaration.

The admirers of customary law love to trick out their idol with mysterious and imposing attributes. But to those who can see the difference between positive law and morality, there is nothing of mystery about it. Considered as rules of positive morality, customary laws arise from the consent of the governed, and not from the position or establishment of political superiors. But, considered as moral rules turned into positive laws, customary laws are established by the state: established by the state directly, when the customs are promulged in its statutes; established by the state circuitously, when the customs are adopted by its tribunals.

The opinion of the party which abhors judge-made laws, springs from their inadequate conception of the nature of commands.

Like other significations of desire, a command is express or tacit. If the desire be signified by *words* (written or spoken), the command

is express. If the desire be signified by conduct (or by any signs of desire which are *not* words), the command is tacit.

Now when customs are turned into legal rules by decisions of subject judges, the legal rules which emerge from the customs are *tacit* commands of the sovereign legislature. The state, which is able to abolish, permits its ministers to enforce them: and it, therefore, signifies its pleasure, by that its voluntary acquiescence, 'that they shall serve as a law to the governed.'

My present purpose is merely this: to prove that the positive law styled *customary* (and all positive law made judicially) is established by the state directly or circuitously, and, therefore, is *imperative*. I am far from disputing, that law made judicially (or in the way of improper legislation) and law made by statute (or in the properly legislative manner) are distinguished by weighty differences. I shall inquire, in future lectures, what those differences are; and why subject judges, who are properly ministers of the law, have commonly shared with the sovereign in the business of making it.

I assume then that the only laws which are not imperative, and which belong to the subject-matter of jurisprudence, are the following: 1) Declaratory laws, or laws explaining the import of existing positive law. 2) Laws abrogating or repealing existing positive law. 3) Imperfect laws, or laws of imperfect obligation (with the sense wherein the expression is used by the Roman jurists).

But the space occupied in the science by these improper laws is comparatively narrow and insignificant. Accordingly, although I shall take them into account so often as I refer to them directly, I shall throw them out of account on other occasions. Or (changing the expression) I shall limit the term law to laws which are imperative, unless I extend it expressly to laws which are not…

## Lecture V

… Positive laws, or laws strictly so called, are established directly or immediately by authors of three kinds: by monarchs, or sovereign bodies, as supreme political superiors: by men in a state of subjection, as subordinate political superiors: by subjects, as private persons, in pursuance of legal rights. But every positive law, or every law strictly so called, is a direct or circuitous command of a monarch or sovereign number in the character of political superior: that is to say, a direct or circuitous command of a monarch or sovereign number to a person or persons in a state of subjection to its author. And being a *command* (and therefore flowing from a *determinate* source), every positive law is a law proper, or a law properly so called.

Besides the human laws which I style positive law, there are human laws which I style positive morality, rules of positive morality, or positive moral rules.

The generic character of laws of the class may be stated briefly in the following negative manner: No law belonging to the class is a direct or circuitous command of a monarch or sovereign number in the character of political superior. In other words, no law belonging to the class is a direct or circuitous command of a monarch or sovereign number to a person or persons in a state of subjection to its author.

But of positive moral rules, some are laws proper, or laws properly so called: others are laws improper, or laws improperly so called.

Some have all the essentials of an imperative law or rule: others are deficient in some of those essentials of an *imperative* law or rule: others are deficient in some of those essentials, and are styled *laws* or *rules* by an analogical extension of the term.

The positive moral rules which are laws properly so called, are distinguished from other laws by the union of two marks: 1) They are imperative laws or rules set by men to men. 2) They are not set by men as political superiors, nor are they set by men as private persons, in pursuance of legal rights.

Inasmuch as they bear the latter of these two marks, they are not commands of sovereigns in the character of political superiors. Consequently, they are not positive laws: they are not clothed with legal sanctions, nor do they oblige legally the persons to whom they are set. But being *commands* (and therefore being established by *determinate* individuals or bodies), they are laws properly so called: they are armed with sanctions, and impose duties, in the proper acceptation of the terms.

The positive moral rules which are laws improperly so called, are laws set or imposed by general opinion: that is to say, by the general opinion of any class or any society of persons. For example, some are set or imposed by the general opinion of persons who are members of a profession or calling: others, by that of person who inhabit a town or province: others, by that of a nation or independent political society: others, by that of a larger society formed of various nations.

A few species of the laws which are set by general opinion have gotten appropriate names – For example, there are laws or rules imposed upon gentlemen by opinions current amongst gentlemen. And these are usually styled *the rules of honour*, or *the laws* or *law of honour* – There are laws or rules imposed upon people of fashion by opinions current in the fashionable world. And these are usually styled *the law set by fashion*. There are laws which regard the conduct of independent political societies in their various relations to one another: Or rather, there are laws which regard the conduct of sovereigns or supreme governments in their various relations to one another. And laws or rules of this species, which are imposed upon nations or sovereigns by opinions current amongst nations, are usually styled *the law of nations* or *international law*.

Now a law set or imposed by general opinion is a law improperly so called. It is styled a *law* or *rule* by an analogical extension of the term. When we speak of a law set by general opinion, we denote, by that expression, the following fact: Some *indeterminate* body or *uncertain* aggregate of person regards a kind of conduct with a sentiment of aversion or liking: Or (changing the expression) that indeterminate body opines unfavourably or favourably of a given kind of conduct. In *consequence* of that sentiment, or in consequence of that opinion, it is likely that they or some of them will be displeased with a party who shall pursue or not pursue conduct of that kind. And, in *consequence* of that displeasure, it is likely that *some* party (*what* party being undetermined) will visit the party provoking it with some evil or another.

The body by whose opinion the law is said to be set, does not *command*, expressly or tacitly, that conduct of the given kind shall be forborne or pursued. For, since it is not a body precisely determined or certain, it cannot *as a body* express or intimate a wish. *As a body*, it cannot *signify* a wish by oral or written words, or by positive or negative department. The so called *law* or *rule* which its opinion is said to impose, is merely the *sentiment* which it feels,

or is merely the *opinion* which it holds, in regard to a kind of conduct.

In the foregoing analysis of a law set by general opinion, the meaning of the expression '*indeterminate* body of persons' is indicated rather than explained. To complete my analysis of a law set by general opinion (and to abridge that analysis of sovereignty which I shall place in my sixth lecture), I will here insert a concise exposition of the following pregnant distinction: namely, the distinction between a *determinate*, and an *indeterminate* body of single or individual persons – If my exposition of the distinction shall appear obscure and crabbed, my hearers (I hope) will recollect that the distinction could hardly be expounded in lucid and flowing expressions.

I will first describe the distinction in general or abstract terms, and will then exemplify and illustrate the general or abstract description.

If a body of persons be determinate, all the persons who compose it are determined and assignable, or every person who belongs to it is determined and may be indicated.

But determinate bodies are of two kinds.

A determinate body of one of those kinds is distinguished by the following marks: (1) The body is composed of persons determined specifically or individually, or determined by characters or descriptions respectively appropriate to themselves. (2) Though every individual member must of necessity answer to many generic descriptions, every individual member is a member of the determinate body, not by reason of his answering to any generic description but by reason of his bearing his specific or appropriate character.

A determinate body of the other of those kinds is distinguished by the following marks: (1) It comprises *all* the persons who belong to a given class, or who belong respectively to two or more of such classes. In other words, *every* person who answers to a given generic description, or to any of two or more given generic descriptions, is also a member of the determinate body. (2) Though every individual member is of necessity determined by a specific or appropriate character, every individual member is a member of the determinate body, not by reason of his answering to the given generic description.

If a body be indeterminate, *all* the persons who compose it are not determined and assignable. Or (changing the expression) *every* person who belongs to it is not determined and therefore cannot be indicated – For an indeterminate body consists of *some* of the persons who belong to another and larger aggregate. But *how many of those persons* are members of the indeterminate body, or *which of those persons in particular* are members of the indeterminate body, is not and cannot be known completely and exactly…

## Lecture VI

… I shall finish, in the present lecture, the purpose mentioned above, by explaining the marks or characters which distinguish positive laws, or laws strictly so called. And, in order to an explanation of the marks which distinguish positive laws, I shall analyse the expression *sovereignty*, the correlative expression *subjection*, and the inseparably connected expression *independent political society*. With the ends or final causes for which

governments ought to exist, or with their different degrees of fitness to attain or approach those ends, I have no concern. I examine the notions of *sovereignty* and *independent political society*, in order that I may finish the purpose to which I have adverted above: in order that I may distinguish completely the appropriate province of jurisprudence from the regions which lie upon its confines, and by which it is encircled. It is necessary that I should examine those notions, in order that I may finish that purpose. For the essential difference of a positive law (or the difference that severs it from a law which is not a positive law) may be stated thus. Every positive law or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme. Or (changing the expression) it is set by a monarch, or sovereign number, to a person or persons in a state of subjection to its author. Even though it sprung directly from another fountain or source, it is a positive law, or a law strictly so called, by the institution of that present sovereign in the character of political superior. Or (borrowing the language of Hobbes) 'the legislator is he, not by whose authority the law was first made, but by whose authority it continues to be a law.'

The superiority which is styled sovereignty, and the independent political society which sovereignty implies, is distinguished from other superiority, and from other society, by the following marks or characters: (1) The bulk of the given society are in a habit of obedience or submission to a determinate and common superior: let that common superior be a certain individual person, or a certain body or aggregate of individual person. (2) That certain individual, or that certain body of individuals is not in a habit of obedience to a determinate human superior. Laws (improperly so called) which opinion sets or imposes, may permanently affect the conduct of that certain individual or body. To express or tacit commands of other determinate parties, that certain individual or body may yield occasional submission. But there is no determinate person, or determinate aggregate of persons, to whose commands, express or tacit, that certain individual or body renders habitual obedience.

Or the notions of sovereignty and independent political society may be expressed concisely thus – If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.

To that determinate superior, the other members of the society are *subject*: or on that determinate superior, the other members of the society are *dependent*. The position of its other members towards that determinate superior, is a *state of subjection*, or *a state of dependence*. The mutual relation which subsists between that superior and them, may be styled *the relation of sovereign and subject*, or *the relation of sovereignty* and *subjection*.

Hence it follows, that it is only through an ellipsis, or an abridged form of expression, that the society is styled *independent*. The party truly independent (independent, that is to say, of a determinate human superior), is not the society, but the sovereign portion of the society: that certain member of the society, or that certain body of its members, to whose commands, expressed or intimated, the generality or bulk of its members render habitual obedience. Upon that certain person, or certain body of persons, the other members of the society are dependent: or to that certain person or certain body of persons, the other members of the society are subject. By 'an independent political society', or 'an independent and sovereign

nation', we mean a political society consisting of a sovereign and subjects, as opposed to a political society which is merely subordinate: that is to say, which is merely a limb or member of another political society, and which therefore consists entirely of persons in a state of subjection.

In order that a given society may form a society political and independent, the two distinguishing marks which I have mentioned above must unite. The generality of the given society must be in the habit of obedience to a determinate and common superior: whilst that determinate person, or determinate body of persons must not be habitually obedient to a determinate person or body. It is the union of that positive, with this negative mark, which renders that certain superior sovereign or supreme, and which renders that given society (including that certain superior) a society political and independent.

In order that a given society may form a society political and independent, the positive and negative marks which I have mentioned above must unite. The generality or bulk of its members must be in a habit of obedience to a certain and common superior: whilst that certain person, or certain body of persons, must not be habitually obedient to a certain person or body.

But, in order that the bulk of its members may render obedience to a common superior, how many of its members, or what proportion of its members, must render obedience to one and the same superior? And, assuming that the bulk of its members render obedience to a common superior, how often must they render it, and how long must they render it, in order that that obedience may be habitual? Now since these questions cannot be answered precisely, the positive mark of sovereignty and independent political society is a fallible test of specific or particular cases.

Note* – on the prevailing tendency to confound what is with what ought to be law or morality, that is, first, to confound positive law with the science of legislation, and positive morality with deontology; and secondly, to confound positive law with positive morality, and both with legislation and deontology.

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law which actually exists, is a law, though we happen to dislike it or though it very from the text by which we regulate our approbation and disapprobation. This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it. But simple and glaring as it is, when enunciated in abstract expressions the enumeration of the instances in which it has been forgotten would fill a volume.

Sir William Blackstone, for example, says in his 'Commentaries' that the laws of God are superior in obligation to all other laws; that no human laws should be suffered to contradict them; that human laws are of no validity if contrary to them; and that all valid laws derive their force from that Divine original.

Now, he *may* mean that all human laws ought to conform to the Divine laws. If this be his meaning, I assent to it without hesitation. The evils which we are exposed to suffer from the hands of God as a consequence of disobeying His commands are the greatest evils to which we are obnoxious; the obligations which they impose are consequently paramount to those imposed by any other laws, and if human commands conflict with the Divine law, we ought to disobey the command which is enforced by the less powerful sanction; this

is implied in the term *ought*: the proposition is identical, and therefore perfectly indisputable – it is our interest to choose the smaller and more uncertain evil, in preference to the greater and surer. If this be Blackstone's meaning, I assent to his proposition and have only to object to it, that it tells us just nothing. Perhaps, again, he means that human lawgivers are themselves obliged by the Divine laws to fashion the laws which they impose by that ultimate standard, because of they do not, God will punish them. To this also I entirely assent: for if the index to the law of God be the principle of utility, that law embraces the whole of our voluntary actions in so far as motives applied from without are required to give them a direction conformable to the general happiness.

But the meaning of this passage of Blackstone, if it has a meaning, seems rather to be this: that no human law which conflicts with the Divine law is obligatory or binding; in other words, that no human law which conflicts with the Divine law is a law, for a law without an obligation is a contradiction in terms. I suppose this to be his meaning, because when we say of any transaction that it is invalid or void, we mean that it is not binding: as, for example, if it be a contract, we mean that the political law will not lend its sanction to enforce the contract.

Now, to say that human laws which conflict with the Divine law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence that it is contrary to the law of God, who has commanded that human lawgivers shall not prohibit acts which have no evil consequences, the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment.

But this abuse of language is not merely puerile, it is mischievous. When it is said that a law ought to be disobeyed, what is meant is that we are urged to disobey it by motives more cogent and compulsory than those by which it is itself sanctioned. If the laws of God are certain, the motives which they hold out to disobey any human command which is at variance with them are paramount to all others. But the laws of God are not always certain. All divines, at least all reasonable divines, admit that no scheme of duties perfectly complete and unambiguous was every imparted to us by revelation. As an index to the Divine will, utility is obviously insufficient. What appears pernicious to one person may appear beneficial to another. And as for the moral sense, innate practical principles, conscience, they are merely convenient cloaks for ignorance or sinister interest: they mean either that I have the law to which I object and cannot tell why, or that I hate the law, and that the cause of my hatred is one which I find it incommodious to avow. If I say openly, I hate the law, ergo, it is not binding and ought to be disobeyed, no one will listen to me; but by calling my hate my conscience or my moral sense, I urge the same argument in another and more plausible form: I seem to assign a reason for my dislike, when in truth I have only given it a sounding and specious name. In times of civil discord the mischief of this detestable abuse of language is apparent. In quiet times the dictates of utility are fortunately so obvious that the anarchical doctrine sleeps, and men habitually admit the validity of laws which they dislike. To prove by pertinent reasons that a law is

> pernicious is highly useful, because such process may lead to the abrogation of the pernicious law. To incite the public to resistance by determinate views of *utility* may be useful, for resistance, grounded on clear and definite prospects of good, is sometimes beneficial. But to proclaim generally that all laws which are pernicious or contrary to the will of God are void and not to be tolerated, is to preach anarchy, hostile and perilous as much to wise and benign rule as to stupid and galling tyranny.[11]

[11] Do Austin's lectures seem rather dry stuff? It is important to read this material in conjunction with Roger Cotterrell's Chapter 3: 'Sovereign and Subject: Austin and Bentham' and Morrison's Chapter 4: 'Thomas Hobbes and the origins of the imperative theory of law: or *mana* transformed into earthly power' to see the location and meaning of Austin's project.

Austin always said that his work in *The Province* was 'merely prefatory' to a much wider study of what he termed 'general jurisprudence': this was to be the exposition and analysis of the fundamental notions forming the framework of all mature legal systems. The main part of his full lectures (as said above, they were only published after his death in 1863) was given to an analysis of what he called 'pervading notions', such as those of right, duty, persons, status, delict and sources of law. Austin distinguished this general, or analytical, jurisprudence from the criticism of legal institutions, which he called the 'science of legislation'; he viewed both the analytical and the critical exposition as important parts of legal education. He is largely remembered, however, for the analytical heritage and his critical exposition (largely influenced by notions of utility) is usually skated over.

### 3.3.2 Austin and utilitarianism

The young Austin once declared himself to be a disciple of Jeremy Bentham, and utilitarianism is a continuing clear theme (though Austin was a believer in God and made utility the index of God's will or plan for creation, while Bentham was secular) in the work for which Austin is best known today. Austin interpreted utilitarianism so that Divine will is equated with utilitarian principles: 'utility is the index to the law of God... To make a promise which general utility condemns, is an offense against the law of God' (Austin, 1873: Lecture VI, p. 307; see also Austin, 1995: Lecture II, p. 41). This reading of utilitarianism has had no long-term influence, though in his nineteenth-century review of Austin's *Lectures*, John Stuart Mill was at pains to say that his work represented the application of utilitarianism to law and largely ignored the religious aspects. According to Rumble, most contemporaries saw Austin as a utilitarian and the young Austin certainly shared many of the ideas of the Benthamite philosophical radicals; namely notions of progress, rule through knowledge, political economy, as well as accepting the ideas of Thomas Malthus (see Rumble, 1985, pp. 16–17; Morrison, 1997, Chapter 9).

Austin made a lasting impact for at least two reasons.

#### 1 Analytical jurisprudence

Austin argued for an **analytical** analysis of law[12] (as contrasted with approaches to law more grounded in history or sociology, or arguments about law which were secondary to more general moral and political theories). Analytical jurisprudence emphasises the analysis of key concepts, including 'law', '(legal) right', '(legal) duty', and 'legal validity'. Analytical jurisprudence became the dominant approach in analysing the nature of law (see Cotterrell, 2003, for an explanation for this). However (and this is crucial to acknowledging what his project was to correct the misunder-

[12] There is some evidence that Austin's views later in his life may have moved away from analytical jurisprudence towards something more approximating the historical jurisprudence school. (Hamburger, 1985, pp. 178–91).

standing of many commentators), it is important to appreciate that in Austin's hands analytical jurisprudence was only one part of an overall project. Many later writers have confused the aim of being analytical with the notion that this is all one has to say about law and thus that law is simply what you can formally reduce it to (this idea is sometimes called 'legal formalism', a narrow approach to understanding the role of law). It is a mistake to see either Austin in particular, or analytical jurisprudence in general, as opposing a critical and reform-minded effort to understand law and its social, political and economic effects. The approach to understanding law that is loosely grouped under the title 'legal realism', for example, argued that law could only be understood in terms of its practical effects (so for example, law was what the courts actually did…). But realists tended to downplay doctrine and legal categories, seeing them as irrelevant. By contrast, Austin saw analytical jurisprudence as attaining clarity as to the categories and concepts of law, as for the morality of law, its effectiveness, its use and abuse, or its location in historical development…these were different questions (and clearly also important to understand how to use law as a technique of rational government!).

## 2 Legal positivism

Austin tied his analytical method to a systematic exposition of a view of law known as 'legal positivism'.[13] Austin, as we have seen in looking at Hobbes, was not the first writer to say that the law of the legal system of a nation state should be seen as something 'posited' by human judgments or processes, but most of the important theoretical work on law prior to Austin had treated jurisprudence as though it were merely a branch of moral theory or political theory: asking how the state should govern (and when governments were legitimate), and under what circumstances citizens had an obligation to obey the law. For Austin, however, and for legal positivism generally, law should be an object of 'scientific' study, the identification of something as law or legally valid was determined neither by prescription nor by moral evaluation; law was simply law, and its morality was another issue. Austin's subsequent popularity among late nineteenth-century English lawyers stemmed in large part from their desire to approach their profession, and their professional training, in a more serious and rigorous manner (Cotterrell, 2003, pp. 74–77). Legal positivism asserts (or assumes) that it is both possible and valuable to have a morally neutral descriptive (or perhaps 'conceptual', to take Hart's term) theory of law.

[13] The main competitor to legal positivism, in Austin's day as in our own, has been natural law theory. Austin can also be seen as clarifying the study of the common law from the traditional ideas of timeless sources and other vague notions he considered mystifications.

It is always a simplification to generalise;[14] however, it can be maintained that those who adhere to legal positivism do not deny that moral and political criticism of legal systems is important; instead they insist that a descriptive or conceptual approach to law is valuable, both on its own terms and as a necessary prelude to criticism. The similarities between Austin and Thomas Hobbes have been stressed, but David Hume, with his argument for separating 'is' and 'ought' (which worked as a sharp criticism for some forms of natural law theory, which purported to derive moral truths from statements about human nature), should also be mentioned as sharing in the intellectual framing of this division. The common theme to Hobbes, Hume, Bentham and Austin is the demand for clarity of conception and separation of different discursive realms.

[14] Remember Austin's famous formulation of the distinction: 'The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation.' (Austin 1995: Lecture V, p. 157)

### Summary

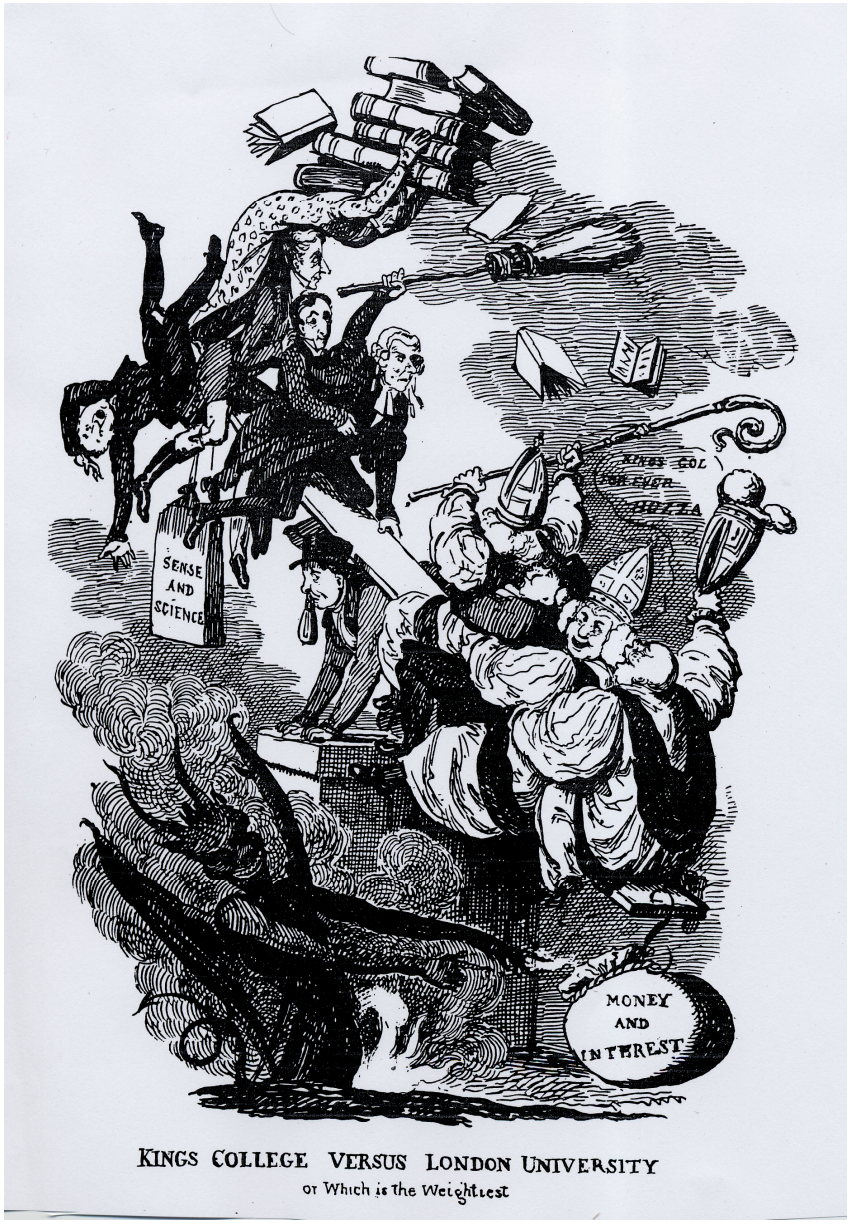
Today we remember Austin for his particular version of legal positivism, his 'command theory of law'. However, it should be remembered that he clearly stated that his theory drew upon Hobbes and Bentham – both of whose theories could also be characterised as 'command theory'. Austin's work was more influential in this area, partly because Bentham's jurisprudential writings did not appear in even a roughly systematic form until well after Austin's work had already been published (Bentham, 1970, 1996; Cotterrell, 2003, pp. 52–53).

## 3.4 Appreciating Austin's command theory

Both the common law tradition and natural law theories gave an image of law as something that was not at the government's behest to use as the government desired. Instead law was 'other' than governmental power. By contrast, Hobbes, Bentham and Austin identified (positive) law as the creation of government (the sovereign) and as part of government's instruments to achieve (rational, coherent and defendable) rule.

There are always at least two things going on that we can learn from the writers we have looked at in this chapter. Take Austin: he tried to find out what can be said generally, while still capturing the basic form, about all laws and this was a necessary step for those interested in law (and power) to understand the nature of the instrument that could be used to shape relations in a modern society. Later commentators have concentrated upon his work as an example of analytical philosophy and have seen it either as a paradigm or a caricature of the analytical method. We have seen from the extracted sections that his lectures were dryly full of distinctions, but are thin in trans-historical argument. To some contemporary critics, his work is very limited and the modern reader is forced to fill in much of the meta-theoretical, justificatory work, which cannot be found in the text. But is this a problem of the text or of our historical appreciation? Austin wrote for an audience; his *Lectures* were simply that – lectures – and thus principally orientated to that purpose.

Thus we may appreciate that where Austin articulated his methodology and objectives he gave them expressions drawing upon the accepted discourses of the times: he 'endeavoured to resolve a law (taken with the largest signification which can be given to that term properly) into the necessary and essential elements of which it is composed' (Austin, Lecture V, p. 117).




**Austin had been appointed the first professor of law at a body which was attempting to be called the University of London in 1928. This body, which is now University College London (the largest College of the Federal University of London), was founded on secular and utilitarian lines. It was opposed by many, including a rival King's College founded in 1828. In this anonymous cartoon of the time, a clutch of bloated bishops, including the Archbishop of Canterbury, with the added weight of money and interest, are pitted against Brougham (waving the broom, the government minister supporting the proposal for the new university) and Bentham (clad in dressing gown), supported by Sense and Science.**

**(Image: courtesy of the University of London).**

**In another cartoon of the time, King's College was represented as a huge palace with, however, very small windows, since 'no new light is required'. Austin expressly stated his aim was to bring light to the chaos of legal thought.**

### 3.4.1 Austin's analysis of law

As to what is the core nature of law, Austin's answer is that laws ('properly so called') are commands of a sovereign; they exist in a relationship of political superiority and political inferiority. He clarifies the concept of positive law (that is, man-made law) by analysing the constituent concepts of his definition, and by distinguishing law from other concepts that are similar:

- **Commands** involve an expressed wish that something be done, and 'an evil' to be imposed if that wish is not complied with.
- **Rules** are general commands (applying generally to a class), as contrasted with specific or individual commands.

Positive law consisted of those commands laid down by a sovereign (or its agents), to be contrasted to other law-givers, such as God's general commands, or the general commands of an employer. The 'sovereign' was defined as a person (or collection of persons) who receives habitual obedience from the bulk of the population, but who does not habitually obey any other (earthly) person or institution. Austin thought that all independent political societies, by their nature, have a sovereign. Positive law should also be contrasted with 'laws by a close analogy' (which includes positive morality, laws of honour, international law, customary law, and constitutional law) and 'laws by remote analogy' (e.g. the laws of physics) (Austin, Lecture I).

Austin also wanted to include within 'the province of jurisprudence' certain 'exceptions' – items which did not fit his criteria but should nonetheless be studied with other 'laws properly so called': repealing laws, declarative laws, and 'imperfect laws' (laws prescribing action but without sanctions, a concept Austin ascribes to 'Roman [law] jurists') (Austin 1995: Lecture I, p. 36).

In the criteria set out above, Austin succeeded in delimiting law and legal rules from religion, morality, convention and custom.[15] However, also excluded from 'the province of jurisprudence' were customary law (except to the extent that the sovereign had, directly or indirectly, adopted such customs as law), public international law and parts of constitutional law.

[15] These exclusions alone would make Austin's theory problematic for most modern readers.

Within Austin's approach, whether something is or is not 'law' depends on which people have done what: the question turns on an empirical investigation, and it is a matter mostly of power, not of morality. Of course, Austin is not arguing that law should not be moral, nor is he implying that it rarely is. Austin is not playing the nihilist or the sceptic. He is merely pointing out that there is much that is law that is not moral, and what makes something law does nothing to guarantee its moral value:

> The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. (Austin 1995: Lecture V, p. 158)

While Bentham was an opponent of judicial lawmaking, Austin had no objection to it, describing it as 'highly beneficial and even absolutely necessary' (Austin, 1995: Lecture V, p. 163). Austin simply incorporated judicial lawmaking into his command theory: by characterising that form of lawmaking, along with the occasional legal/judicial recognition of customs by judges, as the 'tacit

commands' of the sovereign, with the sovereign's affirming the 'orders' by its acquiescence (Austin, 1995: Lecture 1, pp. 35–36).

### 3.4.2 Criticisms of Austin

Many readers come to Austin's theory mostly through the criticisms made of it by other writers (prominently, by Hart).[16] As a result the weaknesses of the theory are almost better known than the theory itself (many answers to examination questions on the command theory or the work of John Austin are full of the criticisms but leave the examiner uncertain as to whether the student knows the theory about which he or she has just listed the criticisms!).

[16] Many of the current textbook references to Austin appear to accept the validity of Hart's criticisms developed against a model of the imperative theory of law based on Hart's reading of Austin and presented in the first four chapters of *The Concept of Law.* Both Cotterrell and Morrison, conversely, argue that Hart's treatment may be analytically pleasurable, but is based on a abstracted model and not in keeping with an historical understanding of Austin's project.

Some of these criticisms only make sense when we apply an analytical critique to Austin; thus it is often claimed that in many societies, it is hard to identify a 'sovereign' in Austin's sense of the word (a difficulty Austin dismissed when discussing Mexico, for example, by saying it was a matter of factual analysis; but we may note that he had to describe the British 'sovereign' rather awkwardly as the combination of the King, the House of Lords, and all the electors of the House of Commons). In other places Austin talked even more loosely about using 'sovereign powers'. Putting the focus on a 'sovereign' as the source of law makes it difficult to explain the continuity of legal systems: a new ruler will not come in with the kind of 'habit of obedience' that Austen sets as a criterion for a system's rule-maker. However, one could argue (see Harris, 1977) that the sovereign is best understood as a constructive metaphor: that law should be viewed *as if* it reflected the view of a single will (a similar view, that law should be interpreted as if it derived from a single will, can be found in Ronald Dworkin's work (1986)). It is also a common criticism that a 'command' model seems to fit some aspects of law poorly (e.g. rules which grant powers to officials and to private citizens – of the latter, the rules for making wills, trusts and contracts are examples), while excluding other matters (e.g. international law) which we are not inclined to exclude from the category 'law'. More generally, it seems more distorting than enlightening to reduce all law to one type. For example, rules that empower people to make wills and contracts perhaps can be re-characterised as part of a long chain of reasoning for eventually imposing a sanction (Austin spoke in this context of the sanction of 'nullity') on those who fail to comply with the relevant provisions. However, such a re-characterisation as this misses the basic purpose of those sorts of laws – they are arguably about granting power and autonomy, not punishing wrongdoing.

A powerful criticism is that a theory which portrays law solely in terms of power fails to distinguish rules of terror from forms of governance sufficiently just that they are accepted as legitimate by their own citizens. (Austin was aware of some of these lines of attack, and had responses ready; it is another matter whether his responses were adequate.) Austin also did not go into a discussion of his methodology; he was rather concerned to get his message across to his audience. Austin, however, laid out the structure for modern legal positivism and when Hart revived legal positivism in the middle of the twentieth century (Hart, 1958, 1994), he did it by criticising and building on Austin's theory. In some respects he followed the legal pluralism obvious from Austin's first lecture: for example, Hart's theory did not try to reduce all laws to one kind of rule, but emphasised the varying types and functions of legal rules.

Moreover, he was still conscious of the varying relationships between individuals and the legal order, for his theory, grounded partly on the distinction between 'obligation' and 'being obliged', was built around the fact that some participants within legal systems 'accepted' the legal rules as reasons for action, above and beyond the fear of sanctions; others, however, obeyed because of sanctions or simply habit

### 3.4.3 A contemporary view?

Austin's work was highly fashionable in the late nineteenth century and for part of the twentieth. Then came a period of deprecation. Today he is reassessed. Put in his historical context, Austin can be seen as all too trusting of centralised power and his writing as a strange mixture of analyticism and realism. Certainly Austin kept the political nature of law and the connection of law and power at the centre of his analysis. When circumstances seem to warrant a more critical, sceptical or cynical approach to law and government, Austin's equation of law and force will be attractive, as with Yntema, who simply stated in 1928 (at p. 476): 'The ideal of a government of law and not of men is a dream.' Such a reading may today be from Austin's own mixture of liberal/conservative-utilitarian views at the time of his writing, and his even more conservative political views later in his life. In our contemporary times, as we see the failed states of Iraq and various other nations, the message of Hobbes that security comes before all else is treated as a common-place. Whether law could be used as a rational instrument of government is another matter.

**Reminder of learning outcomes**

By this stage you should be able to:

- adopt an effective approach to reading original extracts from key writers
- critically discuss the emergence and core meaning of legal positivism
- discuss the advantages and disadvantages of a theory of law based on the idea of the commands of the sovereign
- analyse the social and political context in which Austin wrote and how Hart has interpreted his project.

**Sample examination questions**

**Question 1** Has Austin's theory contributed to our understanding of law?

**Question 2** What are the advantages and disadvantages of seing law as a set of commands?

**References**


- Austin, J. *The Province of Jurisprudence Determined*, 1832 (other editions, e.g. H.L.A. Hart, 1954, also 1995).
- Austin, J. *Lectures on Jurisprudence or the Philosophy of Positive Law*. Edited by Robert Cambell. 2 vols. (1863; fifth edition, 1885).
- Cotterrell, R. *The Politics of Jurisprudence.* (London: Butterworths Law, 2003) second edition.
- Dworkin, R. *Law's Empire*. (London: Fontana Paperbacks, 1986).
- Hamburger, L. and J. Hamburger *Troubled Lives: John and Sara Austin*. (Toronto: University of Toronto Press, 1985).
- Harris, J. *Legal Philosophies.* (London: Butterworths, 1997) second edition.
- Morrison, W. *Jurisprudence: From the Greeks to Post-modernism.* (London: Cavendish, 1997).
- Rumble, W. *The Thought of John Austin: Jurisprudence, Colonial Reform and the British Constitution*. (London: The Athlone Press, 1985).
- Yntema, H 'The Hornbook Method and the Conflict of Laws', *Yale Law Journal* 37, 1928.

***Feedback to activities: Chapter 3***

**Activity 3.1** No feedback provided.

**Activity 3.2** No feedback provided.

**Activity 3.3** This is a good example of an examination question which has a core subject matter that comes from one section of the module but in which to answer the question properly you need to draw upon your understanding gained from the module as a whole. You need to understand what sort of claims were made in the name of natural law and the aim of the positivist project. How far do you agree with the student who commented towards the end of their answer:

> Living in a Muslim country where parts of our law are Sharia laws that come from the Quran [sic], I find it difficult to accept Hart's theory of the minimum content of law, and like Finnis, I feel that his theory is too minimal. The overlaps in law and morals stated are too little. Since some of our laws are divined from religious sources which not only states laws but also gives guidance on moral conduct, there is a lot of overlap between laws and morals and a lot of laws can be said to have a moral content. Even though the five truisms given by Hart are true for my society and I can relate to them, there are many others that are ignored by Hart and not covered in his theory…

Here is yet another from the same batch of scripts:

> Reading about the minimal content of natural law as a woman in a Muslim society I find the emphasis on a shared minimum the only realistic answer for interacting between cultures and different social groups. I am a sincere Muslim but when I read the Quran I can not often see all the rules imposed on Woman that male interpreters claim are there…
>
> I think that the Prophets were concerned to give both a minimum and then guidance for the times they appeared. I understand that there have been others in the English history that have said similar things to Hart – Hobbes, Hume and Adam Smith (?) – and there are many who say that one has to include more – Fuller and Finnis (?). So we see the same thing. Do we accept the minimum or are we told what to accept to become the bigger thing? The better Muslim, the better Christian the flourishing legal order… But when we put all the rules in and say that all these rules are backed by true morals then we get a powerful group imposing their image on us. It is better if we can agree on a minimum and then leave it up to each group to voluntarily accept the more rules, that way different groups can live side by side…

**Notes**

# Chapter 4 Classical and modern natural law theory

## Contents



## Introduction

From the time of the ancient Greeks up until the sixteenth or seventeenth centuries, there really was only one kind of 'legal theory' – natural law. The essence of this legal theory was that the law must be understood as a practical application of morality; hence law and morality are intimately connected. Accordingly, much of natural law theory sought to show how legal authorities such as princes, states, and so on, could lay down laws which reflected the true dictates of morality, and were, therefore, just. Why is natural law no longer the only theory of law? In a word, the answer is **positivism**. Legal positivists deny that the law is simply a matter of 'applied' morality. Positivists note that many legal systems are wicked, and that what is really required by morality is **controversial**. For example, some people view a woman's right to have an abortion as an essential human right, while others think of it as tantamount to a right to murder. Yet the law carries on, laying down rules for behaviour, even when the rules are immoral, or when no one can demonstrate to the satisfaction of all whether a rule is moral or not. What positivists conclude from this is that the law is a kind of **social technology** which regulates the behaviour of its subjects and resolves conflicts between them. The law has no necessary moral character.

The philosophy of law, then, according to positivists, is the **philosophy of a particular social institution**, not a branch of moral or ethical philosophy. In working through this chapter, you must always bear in mind this positivist challenge, and ask yourself whether natural law theory is capable of responding to

positivism whilst keeping its character as a plausible moral philosophy.

**Learning outcomes**

By the end of this chapter and the relevant readings you should be able to:

- describe the origins of natural law in ancient Greece and Rome and the basic ideas which inform the natural law tradition
- explain the natural law theory of Aquinas, in particular the relation of natural law to divine law and human law, and the importance of the distinction between *specificatio* and *determinatio* in the generation of law
- explain Finnis's modern natural law theory, in particular his employment of the 'focal meaning' or 'central case' to determine the subject matter of legal theory, his reference to self-evident basic values, and his characterisation of practical reason
- explain in detail Fuller's 'inner morality of law'
- critically assess these various versions of natural law theory in light of the attack on natural law by legal positivists.

**Essential reading**

Either of the following:

- Penner et al., Chapter 2: 'The evolution of natural law', pp. 35–90.
- Freeman, Chapter 3: 'Natural law', pp. 89–198.

## 4.1 The rise of natural law in ancient Greece and Rome[1]

The term 'natural law' is misleading, for it sounds as if it denotes some kind of theory of the law, a 'natural' one, whatever that is. It does not. Originally, 'natural law' was a general moral theory which explained the nature of **morality**, not the nature of **law** *per se*. The basic idea was that man, using his reason, and possibly with the help of the revelation of the gods or God, could come to understand how he should act rightly in respect of his fellow man. This morality of reason and revelation was a morality which purported to take account of man's **nature**, hence the title 'natural'. And because this combination of revelation and reason laid down rules for behaviour, the word 'law' seemed appropriate, hence 'natural law'. Natural law, then, is principally a theory of morality in general, not a theory of law.

But part of the project of acting rightly, of course, was the project of rulers who laid down law for their subjects, and so the claims of natural law morality applied just as much to them as to individuals generally. So a part of natural law (obviously a very important part) explained what it was to rule and legislate and judge cases rightly; so part of natural law was the morality of 'law', narrowly construed as the laws passed by legislation and the legal system of courts, judges, and so on. Nowadays, 'natural law' is generally taken to mean only that part of the original moral theory which explains the way that the law, narrowly construed, operates as part

[1] This passage uses 'man', 'his' and 'he' as they would have been used by earlier writers on natural law. Today we would want to emphasise that the human race is not exclusively male, and would probably say: 'The basic idea was that **human beings**, using **their** reason, and possibly with the help of the revelation of the gods or God, could come to understand how **they** should act rightly in respect of *their* fellow **humans**.'

of the broader moral life of human beings. (As we shall see, however, the most important living natural lawyer, John Finnis, emphasises that the philosophy of law is continuous with general moral or ethical philosophy.) That narrowing of focus has to do with the way in which the nature of morality as explained by natural law theory was drawn upon to justify existing legal authorities.

It has been argued that in small, close-knit, primitive societies, the inhabitants make no distinction between what is morally right and the way they think it right to do things. They do not stand outside their own practices, looking at them from an external standpoint to judge whether they are correct or not; rather, they just 'do what comes naturally', typically treating their rules as timeless and revealed and enforced by the gods. In short, they lack a critical perspective on the standards of behaviour they uphold. Whatever the truth of this quasi-anthropological assertion, it is clear that when different cultures come into contact and are forced to live with each other, a clash of customs will almost certainly occur. The philosophical tradition that began with Socrates, Plato, Aristotle, and the Stoics, and was carried via Rome throughout the West, was faced with this sort of conflict, as the different city states and empires sought to provide workable rules which might govern everyone within their jurisdictions. This philosophical tradition made one of its central questions 'How ought a man to live?', and the answer was sought not in the particular customs or practices of particular cultures, but in our common nature.

The obvious advantage of this approach was that, if successful, all subjects of the state or empire could appreciate the resulting rule of behaviour as appropriate to each of them, rather than constituting the imposition of odd and foreign practices against which they would naturally rebel. Different philosophers adopted different ways of explaining the common nature of man which might deliver a common morality. Very briefly and roughly, Plato believed that those who were properly philosophically instructed might come to grasp – perhaps always imperfectly – the true form or idea of 'justice', and other absolute values. For Aristotle, it was essential to understand man's *telos* (goal, or purpose), which reflected his nature; in particular, Aristotle thought that man was social, political, and sought knowledge, and only when in a position to fulfil these aspects of his nature could men flourish and achieve the 'good life'. The Stoics[2] accorded primacy to man's reason – by reason man could determine those precepts of right conduct which transcended particular cultures, and therefore were universally applicable. The 'law on the books' that most directly resulted from this intellectual activity was the *jus gentium*, which started life as a second class legal order, a stripped-down Roman civil law which applied to foreigners, but which came to be regarded as a higher or superior legal order, in some sense akin to international law, a kind of common law of citizens which applied throughout the Roman Empire.

[2] Stoics: an ancient Greek school of philosophers who believed, among other things, that the mind is a 'blank slate', upon which sense-impressions are inscribed. It may have a certain activity of its own, but this activity is confined exclusively to materials supplied by the physical organs of sense.

The single most important theoretical issue which this philosophical tradition generated, and which forms the core issue of the natural law tradition today, is how this critical, universalistic perspective is properly to be employed to judge the laws of any particular society. In its most extreme form, one can adopt the Latin maxim *lex injusta*

*non est lex*, i.e. an unjust law (unjust, that is, according to the principles of morality, i.e. natural law) does not count as a law, is not a law. Thus if the legislature passed a statute that required everyone to kill their first-born, then such a statute would not have the force of law at all. **Notice this point very carefully:** the claim is not that such a statute would provide a very wicked law, but that even though it was validly passed, the statute would provide no law at all, just because the content of the statute was so at odds with morality, i.e. with natural law.

This most extreme version of the force of natural law theory has been a primary target of positivists; for the positivist, such a statute, assuming it was validly passed, would provide for a perfectly valid law, wicked though it was. One might be morally obliged to disobey such a law, but it would be a law just the same. In just this way, says the positivist, the dictates of morality can be distinguished from the dictates of the law. In the face of this criticism, very few natural lawyers defend the connection of morality and law as being quite so intimate as this. One of this chapter's tasks is to critically examine the different ways in which natural law theorists explain the connection between law and morality. But notice straight away that you are not a natural lawyer simply because you believe you can criticise the law for being out of step with morality. **Everyone believes that**. It is a common exam mistake to state something silly along the lines that 'only natural lawyers judge the law by moral standards'. This is nonsense. Legal positivists, in particular, are happy to criticise immoral laws. They simply do not deny that an immoral law **is** a law. The arch-positivist of the modern era, Jeremy Bentham, was a dedicated social reformer who forcefully attacked the laws of England throughout his life. In doing so, however, he attacked them as bad **laws**, and did not claim that they were non-laws because they were bad. The principal task of natural lawyers, since the rise of legal positivism, has been to show a more plausible connection between law and morality. This would need to be a more robust connection than simply saying that one can criticise the law for being immoral.

### Self-assessment questions

1 What is natural law a theory of?

2 Why is natural law called 'natural law'?

3 Why does natural law theory pay attention to the law of particular states?

4 What is the *jus gentium*, and why is it related to the rise of natural law?

5 What does *'lex injusta non est lex'* mean? Why is this statement regarded as an extreme expression of natural law?

### Activity 4.1

Read either the excerpt from Cicero[3] in Penner et al., pp. 46–50, or the excerpt from Cicero in Freeman, pp. 140–141, and answer the following:

Cicero says: 'And it is not only justice and injustice that are distinguished naturally, but in general all honourable and disgraceful acts. For nature has given us shared conceptions and has so established them in our minds that honourable things are classed with virtue, disgraceful ones with vice. To think that these

[3] Cicero: Marcus Tullius Cicero, Roman statesman, orator and philosopher, 106–43 BC.

things are a mere matter of opinion, not fixed in nature, is the mark of a madman.' He also says, 'And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over all of us, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.'

Are all the ideas Cicero puts forward in these passages about the nature of natural law consistent with each other?

Feedback: see page 75.

## Summary

The natural law tradition arose as the application of a theory of morality which emphasised man's common moral nature to the legitimacy of states. The question of the legitimacy of states and their laws became politically important when empires sought to rule over different peoples with different customs, and so natural law seemed ideally placed to provide a universal standard of justice. Different natural law theories arose, however, which did not agree on what the universal basis of morality was; some emphasised human beings' intellect or reason, others their purpose, others revelation of God's will.

### Reminder of learning outcomes

By this stage you should be able to:

- describe the origins of natural law in ancient Greece and Rome and the basic ideas which inform the natural law tradition.

## 4.2 The natural law of Aquinas:[4] structure

[4] Aquinas: St Thomas Aquinas (1225–1274) Italian-born Christian (Catholic) theologian and philosopher.

While the divine was considered by the ancients to be a source of understanding of morality, a brief review of the rough descriptions of Plato's, Aristotle's and the Stoic's theories of natural law given above shows that God was not an obvious central figure in the equation. Following the Christianisation of the Roman Empire, however, a theory of morality could no longer make reference to God's word solely as a rhetorical gesture. It took the genius of Thomas Aquinas to reconstruct the classical natural law tradition of the Greeks and Romans within Christian theology. The central idea is that the grace of God was held not to conflict with or abolish man's nature, but to perfect it, and in this way a Christianised version of natural law could be seen to continue or bring to fruition the natural law tradition. Aquinas modified Aristotle's teleological perspective so that man's end was not only to live socially and seek knowledge, but to live in a Christian community in which one would come to know, and presumable adore, God. Most importantly, however, he described orders of law, eternal, divine, natural and human law, which purported to show the way in which human reason was able to appreciate what was good and godly –

according to Aquinas, man, by his reason, was able to **participate** in the moral order of nature designed by God. The orders of law were as follows:

**Eternal law**: The whole universe is governed by divine providence or divine reason, which is the ultimate order imposed by the Creator.

**Natural law**: Humans are special creatures in having a special relationship to divine wisdom or providence, in that since they possess reason and free will, they have a 'share' in this divine wisdom themselves. This participation of man in the ordering of his affairs by reason is participation in the rational order ordained by God, and this is natural law.

**Human law**: Human law consists of those **particular** rules and regulations that man, using his reason, deduces from the general precepts of natural law to deal with particular matters. For example, it is a natural law precept that crimes must be punished with a severity that corresponds with the seriousness of a crime, but it is necessary to specify the actual punishment that, say, a thief will receive under a particular legal system, and the use of reason to provide a punishment of, say, two years is the use of reason called 'human law'. This might also be called 'positive' law, as it is the actual law posited by legal institutions.

Finally, there is **Divine law**: This is the law that is revealed by God to man, more or less directly, through the provision of the ten commandments or through scripture more generally, or via the divinely inspired pronouncements of prophets or the Church fathers or the pope. Divine law most directly concerns man in his relation to God and achieving paradise; it lays down how man is to act in relation to God (in terms of the requirement to take part in rituals such as baptism and Holy Communion, and in forswearing[5] other gods or idols, for example) and furthermore covers those matters of the soul which human institutions are unfit to regulate, such as evil thoughts, which are nevertheless of vital importance to a man's relationship with God. Though much of divine law would be Church or Canon Law, to the extent that religious law was also enforced by secular authorities like city states or princes (for example laws against usury or blasphemy or witchcraft), divine law could be instantiated in secular law as well. Furthermore, there is an overlap between this law of revelation and natural law, in such matters as are covered by, for example, the Ten Commandments, where the prohibitions against murder, theft, bearing false witness, and so on, are declared by divine law but can also be appreciated as natural law precepts as well.

[5] Forswearing (from verb 'forswear') = agreeing to have nothing to do with.

### Self-assessment questions

1 According to Aquinas, what is man's *telos*? How does it differ from what Aristotle viewed as man's *telos*?

2 What are the different orders of law in Aquinas's scheme? In what ways do they interact or overlap?

**Activity 4.2**

Consider the criminal law of rape, the law of wills, and the law of taxation. What order(s) of law under the Aquinean scheme do these belong to, and why?

Feedback: see page 75.

## 4.3 The natural law of Aquinas: legal reason, human law, and the obligation to obey the law

We have seen from the preceding that, according to Aquinas, law arises from man's participation, via his reason, in the divine wisdom of God. Sometimes human law is simply a deductive conclusion from the general precepts of natural law. But there is a second way in which human law is created in accordance with natural law, and Aquinas exploits the analogy of the architect to explain this. In order to build a house, one starts with the general idea of a house – that it has rooms, doorways, windows and so on – so that there are, as it were, 'natural law' precepts or requirements of house building. However, the idea of a house does not tell the architect whether the doors must be two metres high, how many rooms and so on. The natural law precepts of house building will require that the doorways must be more than 30 cm high, for a doorway this low would not be functional. But no specific workable height is specified by the mere idea of a house; this specification needs to be done by the architect and, in the same way, while natural law requires that thieves be punished, the natural law does not specify what the particular punishment should be, so long as its severity corresponds in some sense or degree to the seriousness of theft. Aquinas rendered this distinction in Latin: what the natural law lays down – or can be deduced from it by reason alone – is *specificatio*, or specified. What man must practically decide about, compatibly with the natural law but not by deduction from it, such as the proper punishment for theft, is a matter of *determinatio*, determination within the boundaries set by natural law.

Human law also has particular tasks and limits which natural law – the general precepts of morality – does not. While some subjects of the law are naturally inclined to be virtuous, others are of more evil or selfish disposition – which we might perhaps all be in certain moods or times of our life. Thus the law must exert not only a guiding but a disciplinary force to deal with the latter sort of person. The human law must also be general, applying to all subjects, though laws applying to children and perhaps others with limited rational capacity may justifiably differ. The human law cannot be a counsel of perfection; it should attend to the more serious matters of human conduct, and not try to prohibit every vice or insist on every virtue: its task is to ensure a framework of rules which provide for a human community that is capable of flourishing – not to create heaven on earth.

Furthermore, since humans are granted only limited reason and insight, human law cannot be treated merely as the laying down and enforcement of rules. There will always be exceptional cases in which a departure from the strict rule will be justified, and human judges must maintain and nurture this sense of 'equity' in the face of the rules.

Because the human law is a particularisation or determination of concrete rules and principles, which while they must be in keeping with the natural law, are not fully specified by it, the human law is mutable, and will be different in different times and places. Despite this mutable character, it is unwise, according to Aquinas, to change the human laws too often or too radically, even if within the confines of natural law, for custom is important, and the more laws change, the less legitimacy they appear to have; and consequently the proper coercive power of the law is diminished. The law should only be changed if the benefits clearly outweigh these drawbacks.

According to Aquinas, a law only 'obliges in conscience' to the extent that it is in keeping with the natural law. An unjust law has more the character of violence than of law. Yet Aquinas does not draw from this the conclusion that an unjust law is not a law – it continues to partake of the character of law in its form, and in this sense participates in the order of law at least in this minimal way. One must always remember that the law is, from the moral point of view, a necessary human institution of communal practical reason. Every person has the duty to support, and to act so as to foster, conditions for its success. Thus the fact that a law is unjust does not provide one with an absolute licence to disobey it; one must take into account the consequences of one's obedience for the general project of law – disobedience might, for example, generate a willingness amongst people to disobey the law for selfish reasons, or make it more difficult for just laws to be administered, and so on.

**Self-assessment questions**

1 What are the two ways in which the natural law is a source of human law?

2 Explain the difference between *specificatio* and *determinatio*.

3 What particular tasks and limitations does human law have?

4 What is Aquinas's view on the moral obligation to obey the human law?

**Activity 4.3**

Read either the excerpt from Aquinas in Penner et al., pp. 50–65, or the excerpt from Aquinas in Freeman, p.142–146, and answer the following:

What are the strengths and weaknesses of Aquinas's theory of the law?

Feedback: see page 76.

## Summary

Aquinas married Aristotle's natural law theory with the Christian tradition to develop the most refined theory of natural law before the twentieth century, and his work is a fundamental reference point for all natural law theorists. Acquinas's natural law theory shows man, because of his reason, to be a participant in divine wisdom, whose purpose is to live in a flourishing Christian community. Law is a necessary institution in such a community, and just laws will reflect directly (*specificatio*) or indirectly (*determinatio*) the universal morality of natural law.

**Reminder of learning outcomes**

By this stage you should be able to:

- explain the natural law theory of Aquinas, in particular the relation of natural law to divine law and human law, and the importance of the distinction between *specificatio* and *determinatio* in the generation of law.

## 4.4 Modern natural law theory I: Finnis[6]

[6] You may also find it useful to read Hart's introduction to the ideas of natural law in Chapter 8 of his *Concept of Law*.

Modern natural law theory is an attempt to sustain the natural law theorist's project of exposing and emphasising the importance of the connections between law and morality, but which has had to face squarely the objections of legal positivists. John Finnis, the most important contemporary natural law theorist, was a student of H.L.A. Hart's, and one of the strengths of his natural law theory is its respect for the insights of positivism. He ultimately concludes, however, that positivism is at best a partial, and at worst, a fundamentally flawed, theory of law.

### 4.4.1 Finnis's ethical theory

Two major arguments against natural law theory must be addressed by any modern natural law theorist. The first is moral scepticism. '**Realists**' about morality believe that moral values and principles exist, and '**cognitivists**' about morality believe that humans can come to know what these moral values and principles are, so that statements about what is morally right can be judged to be true or false. Moral sceptics of various kinds deny either or both of these views. **Emotivists** of various kinds, for example, believe that what we call our moral beliefs are ultimately just expressions of our emotional attitudes. As an example of a modern positivist who clearly doubted that there were universally valid, objective moral norms that humans could know the truth of, one can cite Kelsen (see Chapter 10). Moral scepticism has itself been attacked as incoherent or nonsensical, but the debate remains a live one. Clearly, if moral scepticism is right, then natural law theory is hopeless, for there would be no objective moral standards that could connect with the law. You should remain aware of this issue, in part because it is a necessary backdrop for understanding Finnis's moral theory, but more generally to understand the broader kind of philosophical challenge that a natural law theory might face. It is well beyond the scope of this course to study in detail the arguments of moral sceptics and their respondents.

The second argument concerns the way in which we might know what morality requires. You may have heard of the **fact/value distinction**, which is akin to the distinction between description and prescription, or the factual and the normative. The fact/value distinction is the distinction between statements which **describe** some aspect of reality, e.g. 'Elizabeth II is Queen of England', and statements which **evaluate** some aspect of reality, or **prescribe** some behaviour, e.g. 'Killing the innocent is wrong' or 'Do unto others as you would have them do unto you'. The leading philosopher of the Scottish Enlightenment, David Hume (1711–1776), famously pointed out that one cannot validly infer or derive evaluative propositions from factual ones; the point is typically put thus, 'One cannot derive an "ought" from an "is".'

Thus it is fallacious (though unfortunately not uncommon) for people to reason like this: 'Because of their biology, women can bear children; therefore, women **ought** to bear children, and it is morally good that they do so, and immoral for them to avoid having children.' It is fallacious to reason from a description of women (that they have the capacity to bear children) to the moral principle that they **ought** to bear children. (G. E. Moore called this fallacy the 'naturalistic fallacy'.) How does this bear on natural law theory? You will have noticed that one of the principal organising ideas of natural law theory is that it looks to the nature of man, or certain aspects of his nature, e.g. that he is social, or that he has reason, or that he can know God. These are all descriptions of man, albeit intended to be more or less ultimate descriptions of his essential nature. But from these characterisations of man, we are supposed to derive moral principles by which man should guide his life. But this reasoning, as we have just seen, is fallacious. To say that man is rational is one thing; it is an entirely different matter to decide whether acting morally amounts to acting rationally. **That** God says to do so and so is one thing; it is another to decide whether one **ought** to obey God.

The argument, then, is that the natural law tradition is founded on the fallacy of deriving **ought** from **is**, and it is not obvious how this argument can be countered.

John Finnis tackles this issue head-on, denying that the natural law tradition (especially as it is represented by Aquinas) is founded on the derivation of 'ought' from 'is'. Rather, he says, natural law theory is founded on man's ability to grasp values **directly**, not inferring them from the facts of the world. According to Finnis, there are basic values that underlie the human appreciation of the value of any particular thing and all man's purposive activities. As presented in his first major work on the topic, *Natural Law and Natural Rights*, published in 1980, these values are life, knowledge, play, aesthetic experience, friendship, religion (not in the sense of any particular religion, but in the value of seeking to understand man's place in the universe), and practical reasonableness (the value of pursuing the other values in a reasonable fashion). These seven values are not inferred from facts about the world or man, but are appreciated directly by humans as valuing beings. While Finnis admits that there can be debates about the list of basic values, he is insistent that the basic values are irredeemably plural and 'incommensurable', that is, the good of one cannot be directly measured against the good of another on some common scale. Thus it is **not** the case that if one is presented an opportunity to play or enhance one's knowledge, one could detect that one had an opportunity to get seven units of play but only five units of knowledge, and so decide to play. Choosing to pursue one value rather than another is not a simple process of this kind. Furthermore, the seven basic values are not mere manifestations of some more basic or master value, such as pleasure, or utility.

**Self-assessment questions**

1 What is moral scepticism? Why does it undermine natural law theory?

2 What is the 'naturalistic' fallacy? Why does it undermine natural law theory?

3 What is Finnis's response to the claim that natural law derives *ought* from *is*?

4 What are the basic values that Finnis describes? Can they be reduced to some more fundamental value?

### 4.4.2 Finnis's natural law theory of law and the criticism of positivism

The essential claim that Finnis makes about the law is that it is a social institution whose purpose is to regulate the affairs of people and thus contribute to the creation of a community in which all people can flourish, i.e. a community in which everyone can realise the seven different basic values. In this way, the law is a moral project. Therefore, in order to rightly describe the law, one must take the position of a person who examines the law with this person in mind (i.e. the practically reasonable person who grasps the seven basic values and the law's purpose in helping people to realise them). This provides a clear connection between moral philosophy and legal philosophy. Whether one's description of law is correct or not will (in part, but very significantly) depend upon whether one's moral views are correct, for one's moral views will inform the way in which one conceives of the project of law. In this way, Finnis denies that positivism provides a full or accurate picture of law. While Finnis welcomes the insights into the nature of law that have originated with positivists, in particular the positivism of H.L.A. Hart, he denies that these insights provide a sufficient theory of law.

**Activity 4.4**

Read either the excerpts from Finnis in Penner et al., pp. 68–71, or in Freeman, pp. 178–80, and answer the following question:

What does Finnis mean by the 'focal' concept of law, and why does he not intend to explain our 'ordinary' concept of law?

Feedback: see page 76.

**Reminder of learning outcomes**

By this stage you should be able to:

- explain Finnis's modern natural law theory, in particular his employment of the 'focal meaning' or 'central case' to determine the subject matter of legal theory, his reference to self-evident basic values, and his characterisation of practical reason.

## 4.5 Modern natural law theory II: Fuller

Unlike Finnis, Fuller did not aim to produce a morality of law on the basis of a general moral theory in keeping with the ancient natural law traditions; rather, he sought to explain the moral content in the idea of 'the rule of law', i.e. governance by rules and judicial institutions as opposed to other sorts of political decision-making or ordering, such as military command or bureaucratic administration. The morality he describes is morality as 'legality', meaning morally sound aspects of governing by rules. For this

reason, Fuller is often credited with devising a 'procedural' natural law theory, in that he does not focus on the substantive content of legal rules and assess them as to whether they are moral or not, but rather concerns himself with the requirements of just law-making and administration.

**Activity 4.5**

Read the excerpt from Fuller either in Penner et al., pp. 74–83, or in Freeman, pp. 157–171, and answer the following questions:

**(a)** What are the eight principles of the morality of law, according to Fuller?

**(b)** Do they, in your opinion, capture the morality of the law?

**(c)** What do you make of Hart's criticism (Hart, H.L.A. *Essays in Jurisprudence and Philosophy*. (Oxford: Clarendon Press, 1983), p. 350) that Fuller's 'principles of legality' 'perpetrate a confusion between two notions it is vital to hold apart: the notions of purposive activity and morality. Poisoning is no doubt a purposive activity, and reflections on its purpose may show that it has its internal principles. ("Avoid poisons however lethal if they cause the victim to vomit", or "Avoid poisons however lethal if their shape, color, or size, is likely to attract notice.") But to call these principles of the poisoner's art "the morality of poisoning" would simply blur the distinction between the notion of efficiency for a purpose and those final judgments about activities and purposes with which morality in its various forms is concerned.'

Feedback: see page 77.

## Summary

Finnis's natural law theory is based on the direct appreciation of self-evidently valuable basic goods – the purpose of law is to provide conditions in which these goods can be realised. His theory is Aquinean in the sense that he follows Aquinas's general theory as regards the *specificatio/determinatio* distinction and its general outlook on attitude subjects must take to unjust laws. Fuller's natural law theory is concerned to vindicate the notion of 'legality' or the rule of law, to provide a sense in which rule by law, as opposed to executive fiat or administration, is distinctive in a morally significant way.

## 4.6 The continuing debate over the connection between law and morality

Although working through this chapter will provide you with the basic ideas which underlie natural law thought, the question of the connection between law and morality is a vast one, and perhaps in the Western philosophical tradition, the most important and deeply contested question there is. Thus you should bear in mind this question as you work through the succeeding chapters. Next you will study the legal philosophy of H.L.A. Hart, who, though a positivist, was always sensitive to the natural lawyer's claims, and again and again addressed the different connections he saw between morality and law. Similarly, when you pass to the work of Ronald Dworkin, you will examine the work of a theorist, who, like natural lawyers, sees an intimate connection between morality and

law, although from a quite different perspective. Dworkin believes that his theory refutes positivism, in part for its failure to account for the role moral theory plays when judges decide cases. There is, finally, a massive literature on this subject, and while we have looked at Finnis's work in detail, there are also modern natural lawyers of different kinds, such as Michael Moore, who deserve attention if you want to read more widely.

## Reminder of learning outcomes

By this stage you should be able to:

- explain in detail Fuller's 'inner morality of law'
- critically assess these various versions of natural law theory in light of the attack on natural law by legal positivists.

## Useful further reading

- Coleman, J. and Shapiro, S. (eds) *Oxford Handbook of Jurisprudence and the Philosophy of Law.* (Oxford: Oxford University Press, 2002) Chapter 1: (John Finnis), 'Natural law: the classical tradition', and Chapter 2: (Brian Bix), 'Natural law: the modern tradition'.
- George, R. (ed.) *Natural Law Theory: Contemporary essays.* (Oxford: Clarendon Press, 1992) (which includes M. Moore's, 'Law as a functional kind', at pp. 188–242).
- Hart, H.L.A. *The Concept of Law.* (Oxford: Clarendon Press, 1994) (second edition) Chapter VIII, 'Justice and morality', and Chapter IX, 'Laws and morals'.
- Hart, H.L.A. *Essays in Jurisprudence and Philosophy.* (Oxford, Clarendon Press, 1983) Chapter 2: 'Positivism and the separation of law and morals', and Chapter 16: 'Lon L. Fuller: The morality of law'.
- Finnis, J. *Natural Law and Natural Rights.* (Oxford: Clarendon Press, 1980).
- Fuller, L. L. *The Morality of Law.* (revised edition) (New Haven: Yale University Press, 1969).
- Morrison, W. *Jurisprudence from the Greeks to Post-modernism.* (London: Cavendish, 1997) Chapter 2: 'Origins: Classical Greece and the idea of natural law', and Chapter 3: 'The laws of nature, man's power, and God: the synthesis of mediaeval Christendom'.
- Shiner, R. *Norm and Nature: Movements of legal thought.* (Oxford: Clarendon Press, 1992).

## Sample examination questions

**Question 1** Why is natural law sometimes historically associated with revolutionary movements, and sometimes with social conservatism? Does this varying association detract from its plausibility as a theory of law?

**Question 2** Besides its undoubted relevance to the history of legal thought, does natural law theory matter any more?

### *Advice on answering the questions*

**Question 1** This question concerns the way in which, under traditional natural law theory, natural law is regarded as a 'higher' law by which positive law is to be judged. Since the natural law is the true dictate of morality, what any person regards as ultimately morally right will provide the content of the natural law, and this vantage point of criticism is available equally to the revolutionary and the conservative. Because of this, the content of natural law will be as controversial as morality is. In one respect, this is just as it should be, for if morality is controversial, so should the content of natural law be; but on the other hand, it does seem to detract from plausibility of natural law's claim that law is intimately connected to morality. For the law seems to be settled at any one time in a way that morality is not, and this would suggest that the connection, if any, is a weak one, and a positivist might claim, as Hart did, that any legal system need only give effect to a minimum content of natural law. In other words, the law must respect basic human nature in so far as it fosters human survival with laws against murder, theft, and so on; but beyond that, it is not determined by morality at all. Much can also be said here about Finnis's and Fuller's natural law positions. Finnis tries to render the connection between morality and law in a much more nuanced fashion, which aims to preserve natural law's critical perspective, while giving little comfort to the revolutionary who fails to see the inherent moral project of the law and would seek to overthrow legal structures *per se*. Similarly, the appeal of Fuller's natural law theory, focusing as it does on process rather than content, would not oscillate so dramatically between reform and conservatism over time.

**Question 2** This question requires an exploration of the contemporary relevance of natural law theory, in particular the natural law theories of Finnis and Fuller, and of people like Moore and George, if you have read more widely. It demands an examination of whether natural law can withstand the central claim of positivism, that it illegitimately glorifies a social institution as necessarily moral, whereas it should be regarded as a human practice, a social technique, which can be put to good or bad ends. You might also consider whether the prevalent moral relativism of a secular age, or philosophical scepticism, has undermined natural law thinking. Finally, does natural law theorising avoid committing, in one way or another, the 'naturalistic fallacy'? Notice how easily this fallacy can be committed – Fuller's description of the principles which make up the 'inner morality of law' commits just this fallacy if Hart is correct in judging him to have mistakenly treated principles of effectiveness as principles of morality.

### *Feedback to activities: Chapter 4*

**Activity 4.1** Notice the two very different sources of natural law (i.e. our understanding of morality in these passages): first, our shared reason – our 'shared conceptions' given us by nature by which we all classify things in the same way, evil with evil, good with good, and so on; but secondly, God, the 'author' of the natural law. Is it not possible for our reason to conflict with what we learn from the revelation of God's will? This tension between reason and revelation was a source of doubt throughout the Renaissance:[7] was the moral law as revealed by God good just because God willed it, or was it willed by God because it was good? Grotius[8] famously denied that right conduct was good just because God willed it, holding that natural law would be valid even if God didn't exist. One of the questions these passages raise is this: does the natural law tradition provide a plausible theory of morality in the first place? After all, for a natural law theory to move on fruitfully to consider the moral character of the law, it must be sound in its fundamentals. But have you any faith that morality can be successfully derived from man's reason alone, or from revelation, or from some combination of the two? A utilitarian would adamantly oppose this sort of characterisation of morality. So does natural law theory's claim that law and morality are at some level connected depend upon the sort of theory of morality you espouse?

[7] Renaissance: (French for 'rebirth) the upsurge of cultural, philosophical and cultural life that spread from Italy to the rest of Europe beginning in the fourteenth century. It was triggered by the rediscovery of classical Greek, Islamic and Roman texts.

[8] Grotius: Hugo Grotius, Dutch legal scholar, 1583–1645.

**Activity 4.2** Assuming that forcible assault and sexual intercourse among citizens is universally regarded as wrong (which, on the anthropological evidence, is a fair assumption), laws prohibiting rape can be seen to reflect the basic precepts of natural law, a prohibition which is universally understood by all with reason. However, various passages in the Bible also testify to the wrongness of rape, and so one can also conclude that the evil of rape is revealed to us by God, and thus forms part of the divine law as well. Note however that the particular legal requirements for criminal conviction, such as the rules regarding *mens rea* and consent, the rules on evidence, and the punishments imposed, are matters of human law. These specific rules are not spelled out by the divine law or natural law. The law of wills is an interesting case, for if the law of wills is the law which concerns looking after one's dependents on one's death, then this might be seen to draw upon both scripture and natural law. It is interesting to note that the law of wills was, in England and elsewhere, originally part of the canon law jurisdiction. Of course, the particular formalities, requirements, and much else in the law of wills, are clearly determined by human beings and form part of the human law. Almost all of the law of taxation, although it might in very abstract terms, draws upon the divine law and natural law – as the law which concerns and specifies our obligations to support our fellow man and provide resources for public goods which underpin a flourishing community – seems clearly to fall within the province of human law.

**Activity 4.3** This is very similar to a general examination question focusing on Aquinas. Aquinas is justly famous for taking the ancient natural law tradition and 'Christianising' it in a way that provides genuine insights into the nature of the relations between law and morality that many people find compelling. In the first place, notice how his theory of the connection between law and morality is often portrayed as *indirect*, but in such a way that this indirect connection is nonetheless quite robust. For example, his characterisation of the orders of eternal, natural and human law emphasises the rational and guiding functions of order and law, so that human law seems naturally to fit within a larger structure. His distinction between *specificatio* and *determinatio*, and his emphasis on the latter as the way in which much human law is created, makes the supreme morality of natural law a constraint upon human law. This seems much more plausible than treating human law as somehow directly ordained by morality.

You should also note the various tasks which must be accomplished by the human law, and the limitations on what it can do, that Aquinas points out, once again explicating the indirect relation of human law to natural law. On the other hand, the theory is unavoidably complicated by Aquinas's religious purposes, his sourcing of law in divine wisdom, and his characterisation of the eternal law. These cannot be regarded as credible features of a theory of law in a secular age. Furthermore, it is arguable that Aquinas talks around, rather than giving a straight answer to, the central question of our moral obligation to follow the law whether the particular rule in question is just or not. Look at the formulations he gives of the way that human law partakes of the order of eternal law, and of the way law obliges in conscience. Could not the guidance he provides about disobeying the law not equally be provided by a positivist: do what is morally right when the law says so, just because it is morally right; conversely, you have no obligation to obey the law if it is morally wrong, but obviously you should take into account the consequences of disobeying the law if that will cause more harm, morally speaking, than obeying, as when it might lead to civil unrest and violence, for example?

**Activity 4.4** The 'focal' concept of law that Finnis describes is a theoretically narrowed, multifaceted conception of law as the rules and institutions which flow from working out of the requirements of practical reasonableness in its quest to provide a community in which the basic values can be realised. It is not the ordinary concept of law, which is much more diffuse, and which allows 'law' to be used of the anthropologist's primitive 'legal' culture, or to be used of the rules of a tyrant's coercive regime or the rules of the Mafia. Finnis is claiming to provide the best concept of law for the theoretical purposes of understanding law. The difficulty with this view is that it looks too 'stipulative', that is, Finnis decides upon his theoretical approach to law, one in the natural law mould, and then argues that the concept of law which differs from the ordinary concept of law is most suited to explaining law; but the sceptic might claim that having at the outset found value in the natural law tradition, Finnis just matches his concept of law to it. The point here is that we are not generally free to choose how we will define our concepts, whatever our theories of the things the concept represents. Our 'ordinary' concept of law is what it is because it

reflects what we all share in terms of what counts as law and what doesn't; and no one is entitled simply to say that our ordinary concept of law is too diffuse or mistaken. The positivist would respond that our ordinary concept of law, which treats wicked legal systems of law as legal systems nevertheless, and wicked laws as laws despite their wickedness, is the concept of law we must explain. It does no good to tailor a concept to match our moral interests, as Finnis arguably does here, for that is simply to change the subject of the inquiry; by doing so, the positivist will respond, Finnis fails to address the phenomenon of law as it is understood by people generally. This sort of criticism cannot be blunted by appealing to the norms of reason of natural science, for example by saying that for the purposes of physics, it doesn't matter what our ordinary concept of, say, mass, is, for physics is sound when it gets the nature of mass right, not because there is some kind of social acceptance of the physicist's theory of mass. The positivist would respond by saying that in the case of social institutions like the law, part of what makes them what they are is what people understand them to be, for institutions like law are made up of intentional human practices, ways of behaving, and so one cannot ignore the concept of the participants themselves in the practice when examining what the practice actually is. Bear these points in mind when you look at H.L.A. Hart's theory of law.

**Activity 4.5** According to Fuller, in order for the law to acquire the value of 'legality', the law must (1) operate by general rules, which (2) must be published to the subjects of the law, and (3) must operate prospectively rather than retrospectively, and (4) which are reasonably clear and intelligible, and (5) which are not contradictory, and (6) which do not change so often and radically so as to make it impossible for a subject of the law to follow the law, and (7) do not require the impossible of the subjects of the law, and finally (8) must be administered in accordance with their meaning and purpose.

Notice that these requirements of 'legal morality', which Fuller sometimes refers to as the 'inner morality of the law', are explained in terms of eight ways in which the law can fail to be made or administered in a just way. This might lead one to question whether these eight principles fully capture the morality of law, for they are all about avoiding doing wrong **rather** than achieving any valuable purposes. Even in procedural terms, it might be argued that Fuller does not capture obvious moral principles. Consider the two principles of 'natural justice' which deeply inform administrative law; *audi alteram partem* ('hear the other party' – the principle that a decision is not fair if both parties to a dispute are not given fair opportunity to present facts and make representations as to the law), and the principle that a tribunal must not be biased, i.e. that the decision-maker cannot have any interest in the proceedings or be related to either party so as to bring him or her into a conflict of interest. Are these not obvious principles of 'legality'? Can they easily be fitted into Fuller's eight principles? Hart's criticism is famous, and at first glance seems decisive, for it does indeed look as if Fuller's principles of legality are principles of **effective law-making**, not morality, which could be turned either to wicked or good purposes. The Nazis would have needed to follow Fuller's principles if they wanted to succeed in using the law to get their subjects to do what they

wanted. There is, however, a possible response to this, though it is questionable whether it vindicates Fuller's view as a 'natural law' view. It might be said that retrospective legislation, legislation setting impossible tasks, or a failure to observe the *audi alteram partem* rule, are not just matters of ineffectiveness, but are obvious instance of unfairness, and thus immoral. While this seems right, it does not seem to establish a necessary connection between law and morality. All it seems to establish is that *if* you have a legal system in operation, then there are new and different ways of acting immorally than there would be if there was no legal system in place. So the existence of different social institutions, like law, the family, marriage or schools, give rise to new and different occasions of wrong-doing. If there were no examinations there could be no cheating in exams; if there were no authors or books there could be no cases of plagiarism. But this doesn't establish that taking examinations is a moral enterprise, or that writing books is. Similarly, the fact that the law provides new and different occasions for acting wrongfully does not seem to establish any necessary connection between law and morality.